



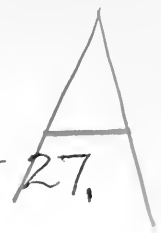






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48855

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	APPEAL FROM THE
)	
v.	)	MUNICIPAL COURT
)	
VINCENT TEDESSO,	)	OF EVANSTON.
)	
Defendant-Appellant.)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant was found guilty of the criminal offense of wilfully and unlawfully attempting to obtain merchandise, in violation of ch. 38, § 581, of the Illinois Revised Statutes, 1959, and was sentenced to confinement in the county jail for a term of six months. He seeks a reversal on two principal grounds: (1) that the information does not adequately state an offense; and (2) that the evidence was insufficient to support the finding of guilty.

The information charges that defendant on November 1, 1961, at the city of Evanston "did then and there wilfully and unlawfully attempt to obtain from Marshall Field and Company, Inc.,...[certain goods] of the value of sixty-nine dollars and 00/100 by means of a charge plate issued to one Ilse Ruth Simon...said Marshall Field & Co., Inc.,...then and there being deceived thereby said act being prevented in its execution, in viol. ch. 38, para. 581, 1959 IRS."

An information based on a statutory offense must be framed on the statute. The offense must be charged either in the language of the statute itself or facts must be specifically alleged which constitute the statutory offense. People v. Sheldon, 322 Ill. 70, 152 N.E. 567; Johnson v. People, 113 Ill. 99; People v. Fain, 30 Ill. App.2d 270, 173 N.E.2d 825 (Abst.).

The statute under which defendant was tried and convicted is generally referred to as a general attempt statute. It punishes "attempts to commit any offense prohibited by law,...where no express provision is made by law for the punishment of such attempt,...."

Under the State's theory the "offense prohibited by law" which defendant attempted to commit was obtaining goods by false token or false pretense. Section 253 of the 1959 Criminal Code (Ill. Rev. Stat., ch. 38, § 253 (1959)), which prohibits the obtaining of goods by false pretense, reads as follows:

"Whoever, with intent to cheat or defraud another, designedly by color of any false token or writing, or by any false pretense, obtains the signature of any person to any written instrument, or obtains from any person any money, personal property or other valuable thing shall be fined...."

It is not necessary for us to consider the evidence because it is clear that the information does not charge the crime of attempting to obtain goods by false pretense. It charges only that defendant wilfully and unlawfully attempted to obtain goods by means of a charge plate issued to another person. It does not charge that the use of the plate was without the permission or authority of the other person. It does not charge that the charge plate was used as a false pretense or token or in what manner it was used to convey a false pretense, or that it was so used in an attempt to cheat and defraud. An information in a prosecution for obtaining property by means of false pretense is fatally defective if it does not charge that the false pretense was made "with intent

to cheat and defraud." People v. Moore, 322 Ill. App. 280, 54 N.E.2d 259 (Abst.); People v. Cohn, 147 Ill. App. 393.

The word "unlawfully" which is used in describing the offense is but a conclusion and is not a substitute for the words essential to a description of the crime of attempting to obtain goods by false pretense. People v. O'Brien, 251 Ill. App. 314. A judgment based on a defective information is void and must be reversed without remandment. People v. Sowrd, 370 Ill. 140, 18 N.E.2d 176; People v. Green, 368 Ill. 242, 13 N.E.2d 278; People v. Fain, 30 Ill. App. 2d 270, 173 N.E.2d 825 (Abst.).

The judgment must be reversed.

Judgment reversed.

Dempsey, P.J., and McCormick, J., concur.

Abstract only.

48862

41 IA²27₂

VIRGINIA E. WOLF and FRANK J. WOLF,)	
)	
Appellees,	)	APPEAL FROM
)	
v.	)	MUNICIPAL COURT
)	
GREEK-AMERICAN REALTY CO., INC.,	)	OF CHICAGO
a corporation,)	
)	
Appellant.)	

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This action was brought in the Municipal Court of Chicago by the plaintiffs, Virginia E. Wolf and Frank J. Wolf, against the Greek-American Realty Co., Inc. for the possession of certain premises under paragraph 2 of chapter 57, Illinois Revised Statutes, which provides that the person entitled to the possession of lands or tenements may be restored thereto "when a vendee having obtained possession under a written or verbal agreement to purchase lands or tenements, and having failed to comply with his agreement, withholds possession thereof, after demand in writing by the person entitled to such possession." The case was heard by the trial judge without a jury, and he entered judgment in favor of the plaintiffs. No question is raised here with reference to the pleadings nor the compliance with the statute with reference to demand.

On January 9, 1961 plaintiff Virginia E. Wolf, who held title to the premises in question, together with her husband Frank J. Wolf negotiated a contract for the sale of the said premises with the defendant through their agent, one Daniel Schlesinger, who was the father of the said plaintiff, Virginia E. Wolf. Virginia E. and Frank J. Wolf resided in St. Joseph, Michigan, and had never met any of the officers

of the defendant corporation, which had acted in the matter through its president, George D. Poulos. Poulos drafted the contract in question at his office in Chicago, after negotiating the terms with Daniel Schlesinger. The contract provided, among other things, that the defendant would assume a first mortgage for the sum of \$10,000 payable to the Lake View Trust and Savings Bank, of Chicago, with interest at 5-3/4%, that the defendant would pay general taxes for the year 1960 and subsequent years, and further that it would pay the sum of \$15,000, with interest at 5% per annum, payable semiannually, as follows: \$1,800 cash, "receipt of which is hereby acknowledged"; \$350 on July 23, 1961 or before; \$350 on January 25, 1962 or before, and the same amounts or more on the 25th day of each semiannual payment day of each month thereafter until such sums are fully paid. The contract further provided that the defendant should have immediate possession of the premises and that the defendant would keep the premises fully insured in companies acceptable to the plaintiffs and deposit the policies with them or with the holder of the mortgage. It further provided that if the defendant failed to make any of the payments or any part thereof the contract shall at the option of the plaintiffs be forfeited and determined, and that the plaintiffs shall have the right to re-enter and take possession of the said property. The contract further provided that the time of payment "shall be of the essence of this contract."

The plaintiffs on February 5, 1962, after the death of Daniel Schlesinger, served a notice on the defendant in which they alleged the defendant was in default because it

had failed to pay \$1,800 to the plaintiffs or to anyone on their behalf; that it had failed to pay the real estate taxes for 1960 and had failed to pay the \$350 semiannual payment due on January 25, 1962. It is further alleged that the defendant had failed to keep the premises fully insured and to deposit the policies with plaintiffs.

On February 14, 1962 the plaintiffs sent a letter, through their attorneys, to the defendant in which, after referring to the notice of February 5th, they stated that on February 10, 1962 they received a letter from the defendant enclosing a check due in the sum of \$350, which check was dated January 23, 1962, and that on February 13, 1962 they received a further letter in which the defendant advised them that the Lake View Trust and Savings Bank was to pay the real estate taxes for the property on February 13, 1962 and would add it to the mortgage indebtedness, and the plaintiffs made a further demand for immediate possession of the property. The check for \$350 was not cashed by the plaintiffs but was returned to the defendant. A further formal demand was served upon the defendant March 19, 1962. Suit was then filed in the Municipal Court of Chicago asking for possession. To the statement of claim the defendant filed an answer, and the court heard the issues without a jury. On May 4, 1962 the court entered a judgment order finding that the defendant was guilty of withholding the premises described in the complaint, and ordering that the plaintiffs have judgment on the finding and that they should recover possession of the said premises. From this judgment order the defendant has taken this appeal.



The defendant's theory of the case is that it had paid to the plaintiffs the \$1,800 provided in the contract of purchase and has paid the real estate taxes for the year 1960 through the Lake View Trust and Savings Bank, the holder of the real estate mortgage on the real estate; that it has kept the premises fully insured pursuant to the contract; and that it has made all semiannual payments required to be made by the provisions of the contract to purchase.

In determining whether the finding and judgment of the Municipal Court were proper we will confine our discussion to the question as to whether the \$1,800 referred to in the contract was in fact actually paid.

Virginia Wolf testified that she had not received the sum of \$1,800 in cash at the time she signed the contract, nor had anybody else received it for her, nor has she received it since. George D. Poulos, the president of the defendant, testified that he had negotiated the contract with Daniel Schlesinger and that he paid Schlesinger \$1,000 in behalf of the plaintiff Virginia Wolf; that the balance of \$800 was paid by the defendant's assuming the semiannual interest which was to be paid to the Lake View Trust and Savings Bank on the first mortgage of \$10,000, and that at that time they did not know the exact amount and Schlesinger gave them credit for \$300; that he paid the said \$300 to the bank and paid \$1,000 in cash and assumed \$500 in taxes for the year 1960. He further testified that a letter was written by the agent of the defendant to the Lake View Trust and Savings Bank telling the bank that defendant had bought the property and there was \$500 in taxes



due for 1960 and that the defendant wanted the bank to pay the taxes and defendant would assume the obligation. The tax bill for the 1960 taxes was \$487.66. On behalf of the plaintiff the manager of the real estate loan department of the Lake View Trust and Savings Bank testified that after he received notice that the defendant had bought the property he asked Mr. Poulos to pay the taxes. This was in September 1961, and the witness testified the bank wrote defendant asking for the receipted tax bill showing payment. The bank received no answer to that letter and subsequently wrote a letter dated February 2, 1962, in which it again asked for a receipted tax bill. In answer to that letter the defendant wrote a letter dated February 7, 1962 enclosing the tax bill for the 1960 taxes and asking that the bank pay the taxes, stating that the defendant would sign a note for that sum. The bank thereupon as mortgagee paid the 1960 taxes and so informed the defendant in a letter dated February 10, 1962, which stated that it intended to pay the 1960 taxes in the amount of \$487.66, which sum will be added to the present mortgage indebtedness of \$10,000. The bank paid the taxes and increased the mortgage indebtedness accordingly.

The defendant here argues that the payment by the bank of the 1960 taxes was a compliance with the contract which provided that the defendant should pay \$1,800 to the plaintiffs. It is, of course, elementary that a mortgagee has the right to protect his interest in the property by paying taxes thereon and increasing the mortgage indebtedness to that extent. The defendant contends that the fact that it assumed the mortgage, together with the provisions in the contract, gave it the right

to have the mortgage increased when the bank paid the taxes. 59 C.J.S. Mortgages, sec. 413, states: "A purchaser who assumes payment of a specified, described mortgage is bound by all its terms and provisions and takes the encumbrances as it stands * * *." The person, when he assumes payment of the mortgage, is chargeable with notice of all its terms and provisions, and he takes it as it stands, subject to all conditions and limitations except such as are inconsistent with the agreement under which he assumes the mortgage. The purchaser's rights and liabilities may be limited by the terms of the assumption agreement. 59 C.J.S. Mortgages, sec. 414. In 27 I.L.P. Mortgages, sec. 211, it is stated that a mortgage assumption clause in a conveyance or contract to convey is a collateral agreement of a personal nature, and such agreement must be construed under the rules which would apply to any contract. In spite of the assumption of the mortgage by the purchaser or prospective purchaser the land is primarily liable and the obligation on the part of the person who assumes the mortgage is personal. Brosius v. Madsen, 297 Ill. App. 94, 98, 17 N.E. 229, 230. There is no right on the part of the vendee to increase the indebtedness secured by the mortgage unless it is so provided by the contract. The contract in the instant case negates any such right. It provides that the defendant shall upon the maturity of any mortgage execute all papers required for the renewal or extension of said mortgage or "for the placing of a new loan on said premises for such amount not exceeding the balance due" from the defendant as the plaintiffs may elect, and to pay all expenses incurred. No right is given

to the defendant to increase the mortgage indebtedness. When the taxes are not paid by the mortgagor in possession the mortgagee has the right to pay them and the mortgagee may add such payment to the amount of the mortgage indebtedness. Lidster v. Poole, 122 Ill. App.. 227; Stinson v. Connecticut Life Ins. Co., 174 Ill. 125, 130, 51 N.E. 193, 195. The contract further provides that if the defendant failed to pay taxes, which under the agreement it is its obligation to pay, then the plaintiffs may pay the same and the amount thereof shall "become so much additional purchase price and be immediately due and payable * * * in addition to the said monthly payments and shall bear interest at seven per centum per annum until paid." The plaintiffs did not take any action under the second provision quoted. The fact that the bank paid the taxes and added the amount to the mortgage which it held as mortgagee did not relieve the defendant from its duty to comply with the terms of the contract. The defendant defaulted in that it did not pay the \$500 as agreed. There are other failures on the part of the defendant to comply with the contract which we do not think it is necessary to discuss.

At the close of the case the trial judge said that the witness for the defendant had told an unbelievable story. We can find nothing in the record to indicate that the statement of the trial judge was not borne out from the testimony and exhibits introduced.

The judgment of the Municipal Court of Chicago is affirmed.

Affirmed.

Dempsey, P.J., and Schwartz, J., concur.

Abstract only.



41 IA² 66 A

48851

JOHN TANCIBOK,	)	APPEAL FROM
)	
Plaintiff-Appellee,	)	CIRCUIT COURT
)	
v.)	
	)	COOK COUNTY
PEARL DAVIS and THEODORE DAVIS,)	
)	
Defendants-Appellants.)	

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

Plaintiff filed a complaint to establish and foreclose a mechanic's lien upon real estate owned by the defendants, alleging that \$1635.00 was due and unpaid on a written contract and several oral contracts for materials furnished to and labor completed upon the said real estate. Defendants answered that the work contracted for was not completed, was not properly done, was not done as contracted to be done and that they owed no money to the plaintiff. The cause was referred to a Master in Chancery to take testimony and to report to the court his conclusions of law and of fact and to make recommendations.

Subsequently, plaintiff petitioned the court to compel both plaintiff and defendants to deposit sums of money with the Master as security for payment of the Master's costs and to compel each to procure and furnish and file a transcript of portions of the testimony heard by the Master.

Pursuant to this petition the court entered an order, which was not then objected to by either party, requiring plaintiff to deposit \$600.00 as security for payment of the cost of reference and to procure and file with the Master in Chancery a transcript of all testimony adduced before the Master on the part of the plaintiff, said transcript to consist of all testimony of witnesses for plaintiff on direct examination, redirect examination, direct

examination on rebuttal, adverse examination of defendants under Section 60, and cross-examination by plaintiff's attorney of defendants' witnesses. The order further directed that the defendants should deposit \$500.00 with the Master to secure payment of all costs of reference and to produce and file a transcript of all testimony adduced on the part of the defendants before the Master, said transcript to consist of all testimony of witnesses for defendants on direct examination, redirect examination, direct examination on rebuttal by defendants' attorneys, all cross-examination by defendants of defendants on adverse examination and all cross-examination by defendants of witnesses for the plaintiff on their direct examination. Finally, the order provided that the deposits were to be made and the transcripts were to be procured and filed within thirty days from the date of the order and that if the plaintiff should fail to comply with the said order the Master should file his report recommending dismissal of the cause and that if the defendants should fail to comply with the order the Master should accept the transcript furnished by the plaintiff as the Report of Proceedings in the cause and consider only that transcript in making his report.

Subsequently, plaintiff made the deposit required of him and procured and filed before the Master a transcript as directed by the order. Defendants neither objected to the order nor complied with it. They simply ignored it. The Master conducted eleven hearings and heard a large amount of testimony after which he made and filed his report based only upon the transcript of testimony filed by the plaintiff. In due course, the court entered a decree based upon the Master's report and the transcript of evidence furnished by the plaintiff alone.

The defendants' appeal to this court sounds in the proposition that the trial court was without jurisdiction to direct the Master to disregard the testimony of defendants' witnesses and defendants' cross-examination of plaintiff's witnesses in preparing his report and making his recommendations to the court because of defendants' failure to deposit a sum as security for the payment of the costs of reference and to procure and file a transcript of all of the aforesaid defendants' testimony and the testimony of plaintiff upon the cross-examination by defendants.

Turning our attention first to that part of the order which required both parties to procure and file transcripts before the Master, defendants have alleged that the trial court lacked statutory or inherent power to make such a requirement and have cited *Nutriment Company v. Green Lumber Co.*, 195 Ill. 324 for the proposition that neither the Master nor the court has authority to require a litigant to pay a stenographer for taking and transcribing testimony. It is our opinion that that case, decided in 1902, is not applicable because it was decided pursuant to a statute which has since been revised and amended. The statute then in force, Hurd Ill. Rev. Stat. 1901, Ch. 53, Par. 20, (§20), made no provision for the memorializing of evidence by stenographic record and no allowance to the Master was authorized in a case wherein a stenographer was necessarily employed. However, in 1908, that statute was amended, inter alia, in the following manner: "The court may also include as a part of such master's fees a reasonable allowance, not to exceed fifteen cents per hundred words, for stenographer's service in cases where the master shall certify that a stenographer was necessarily employed, and shall attach to his report a certified copy of the testimony taken by such

stenographer." (It might be noted that the maximum remuneration of fifteen cents per hundred words has not been increased since 1908 and it is highly doubtful that one can now obtain competent stenographic service at that rate.) In the case at bar, although this portion of the statute was not strictly complied with, we see no practical difference between the situation wherein the Master includes, as part of his fees, the stenographic charges as reimbursement for what he has already paid the stenographer and the instant situation wherein the Master simply required the parties to pay the necessary stenographic costs directly to their own stenographer rather than to him so that he might pay the stenographic costs.

Turning our attention now to that part of the order which required the litigants to deposit a sum of money with the Master to secure payment of the costs of reference, defendants first contend that the provisions of Ill. Rev. Stat. 1961, Ch. 53, Par. 38 (§20), preclude any such deposit with the Master by providing that ". . . the court may . . . order any party seeking to offer evidence before the master to deposit with the clerk of the court such sum or sums as may be fixed by the court to secure the payment of any part or all of the costs of such reference. . . ." Although this statute provides that the court may require a deposit to be made with the clerk of the court, Rule 9.3(a) of the Uniform Rules for Circuit and Superior Courts authorizes the court to order that a deposit be made with the Master for the costs of the reference. It is our opinion that the above cited portion of the applicable statute is not directive, but merely permissive in nature, and does not preclude the court from exercising the power granted to it by Rule 9.3(a) of the Uniform Rules for Circuit and Superior Courts.

Defendants further contend that although the trial court possessed statutory power to require defendants to deposit a sum of money to secure payment of the cost of reference, it was without power to prescribe the penalty that the Master should file his report based solely upon the testimony offered by plaintiff if defendants failed to comply. It is the defendants' theory that the only possible remedy which the court could have employed is expressed in the latter part of the following applicable portion of Ill. Rev. Stat. 1961, Ch. 53, Par. 38, (§20): "Upon reference of any matter to the master in chancery the court may, in its discretion, at the time of such reference or at any subsequent time, order any party seeking to offer evidence before the master to deposit with the clerk of the court such sum or sums as may be fixed by the court to secure the payment of any part or all of the costs of such reference; and the court may, in its discretion, before the master shall be required to make a report in any cause, order the payment of all costs incurred before the master, the same to be taxed equitably in such manner as directed by the court."

It is our opinion that the portion of the above stated statute, following the semicolon, is not a prescription of the penalty for failing to observe an order of the court emanating from the power granted to it by the first part of the sentence, but is rather a further grant of power in a different, though related, area. The first portion of the sentence empowers the court to order that a deposit to cover the cost of the reference be made and the second portion of the sentence empowers the court to order that all costs already incurred may be taxed and must be paid before a final report is submitted. These are two distinct grants of power and the latter is not to be considered as a penalty for failure to observe the former.

Although Section 38 is devoid of any statutory means of enforcing compliance with an order requiring a deposit, this is not to say that the court, when proceeding pursuant to that Section, is impotent to enforce its orders and powerless to keep the judicial machinery in motion. In the case at bar, we can find nothing in the record to support a finding that the device by which the court sought to enforce compliance was unfair or inequitable. The court was empowered to enter the order in question and the Master was obliged to comply with it.

Barringer v. Collins, 337 Ill. 306, a case which is relied upon heavily by the defendants, held that it was improper to require a complainant to secure the cost of reference by making a deposit before being allowed to introduce evidence or to suffer the consequence of having a decree rendered based on the evidence of only the cross complainant, for failure to comply. However, in that case, the court appeared to have been primarily concerned with the inequity of the order, in that it placed the entire burden of securing the cost of the reference on only one of the parties. In reaching its decision the court observed: "In the instant case the cross complainant, who sought affirmative relief and upon whose motion the cause was referred to the master, was allowed to introduce evidence before that officer without making a deposit to secure the payment of the costs to accrue, while the cross defendant who did not ask for a reference to a master was denied the right to offer any evidence because she failed to make such a deposit." The situation in the Barringer case is easily distinguishable from that in the case at bar wherein both parties were obligated to furnish sums of money as a deposit for the cost of reference and both parties faced penalties of equal severity for failure to do so.

Finally, defendants have argued that they were deprived of due process of law as guaranteed by the Fifth Amendment to the United States Constitution and Article 11, Section 2 of the Illinois Constitution in that the evidence which they presented was totally disregarded. Although we feel that this contention is without merit, we do not propose to resolve it in this court. Section 75 of our Civil Practice Act provides, inter alia, that all cases involving constructions of constitutional provisions shall be appealed directly to the Supreme Court. By taking their appeal to this court, the defendants have waived these constitutional questions. The rule is, ". . . that if an appeal to the Appellate Court contains issues over which the court has jurisdiction and others which are not within its jurisdiction, the latter are considered waived." Jones v. Jones, No. 48736, filed January 30, 1963, Illinois Appellate Court, not yet published; The People v. Cospers, 5 Ill.2d 97; Village of Maywood v. Weglarz, 24 Ill. App.2d 495.

The decree is therefore affirmed.

AFFIRMED.

BURKE, J., and FRIEND, J., concur.

48977

41 IA 67

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Defendant in Error,	)	WRIT OF ERROR TO
)	
v.	)	THE CRIMINAL COURT
)	
ALBERT BALDARE,	)	OF COOK COUNTY.
)	
Plaintiff in Error,)	

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

Albert Baldare and Carl Aiello, police officers employed by the Sheriff of Cook County, were indicted for extorting money from Junior Mikel by threatening to accuse him of contributing to the delinquency of a minor. (Ill. Rev. Stat., 1959, ch. 38, sec. 240.) They pleaded not guilty, waived a jury trial and were found guilty by the court. Baldare was sentenced to 120 days in jail and Aiello to 60 days.

Baldare appealed to the Supreme Court, contending that his constitutional rights were violated and that he was not proven guilty beyond a reasonable doubt. The case was transferred to this court. If a case in which constitutional issues are presented is transferred to the Appellate Court, it must be concluded that the Supreme Court determined that such questions were not properly raised, are not involved or are not material to the disposition of the appeal. People v. Campbell, 27 Ill. App. 2d 456, 170 N.E.2d 19; Village of Maywood v. Weglarz, 24 Ill. App. 2d 495, 165 N.E.2d 362. The only issue to be considered, therefore, is whether the defendant's guilt was proven beyond a reasonable doubt.

Baldare and Aiello were Juvenile Officers assigned to

the Cook County Bedford Park Police Station. Aiello had been requested by a Probation Officer of the Family Court to pick up a 17 year old girl, Carol Pagden, for violation of probation. He in turn asked the police of the Village of Hodgkins to do this. About 7:00 p.m. on August 10, 1960, the village police stopped Carol and her fiance, Junior Mikel, 20 years of age, as they were riding in his car. This happened just a few minutes after they had left the home of his parents with whom he lived. He parked his car and accompanied Carol and the policemen to the Bedford Station eight miles away.

At the station Mikel was put behind the desk and Carol was taken into another room. Before Aiello started questioning her she was asked by Baldare how long she had been living with Mikel. She said she wasn't living with him, and he told her to stop lying.

Mikel testified that Aiello told him that he was in serious trouble and could be charged with contributing to the delinquency of a minor, put in jail for a year and fined. Later, Baldare called him aside, said they would do what they could to help him and handed him a piece of paper on which \$500 was written. Mikel said he couldn't get that much and Baldare scratched out the \$500 figure and wrote \$300. Mikel telephoned his employer and others but was not successful in raising the money. Between 10:30 and 11:00 p.m. Carol's uncle came to the station and she was released. After they left Mikel told Baldare that he could get the money if the policeman would drive him to his home or his sister's home. Baldare agreed but Aiello objected, saying: "No, let's don't. Let's just book him now and forget

about it."

They both went with him, however, and arrived at his home about 11:30 p.m. He awakened his parents and his father came out to the car. Baldare informed his father that he was in serious trouble and went into the house with his father. He followed a few minutes later. Baldare told his parents that he could be fined \$2,000.00 or put in jail for a year. Baldare stressed his own willingness to help and Aiello's reluctance, and reduced the demand to \$200.00. The parents said they didn't have that much; however, they agreed to give a check for \$150.00. Baldare repeated that \$200.00 was necessary but said he would help out by putting in \$50.00 which Mikel could later repay. The father got the checkbook, Mikel wrote the check payable to cash and his father signed it. He drove with the officers to three places; at the third Baldare was able to cash the check. They then drove to the Bedford Park Station. The officers got out of the car and went to another auto; then Baldare returned and drove him back to his own car.

Junior Mikel's testimony was corroborated by his father and mother. Carol, who at the time of the trial was married to Junior, testified that she heard the officers say they were going to hold him for contributing to the delinquency of a minor but that she did not hear any conversations between him and the officers.

The defendants denied holding Mikel in the station, threatening to accuse him of a crime, demanding money and receiving or cashing a check. They said he stayed on at the station, while they went about other business, only because he

wanted to be with his girl friend. They admitted that they drove him home and talked to his father at the car. They denied saying anything to the father except that his son should stay away from the girl until she was 18, and they denied seeing his mother. They admitted making no report to the Family Court Probation Department about Carol's arrest, their conversation with her or the disposition of her case. The explanation of this was that they did not have to because she was released in the custody of her uncle, who was the Police Chief of McCook, Illinois. The cashed check, which was admitted into evidence, was not endorsed by either defendant.

As can be seen, the testimony is flatly contradictory. The testimony of the witnesses for the prosecution established the charge of extortion by threats and was sufficient, if believed by the trier of facts, to prove the guilt of the defendant. On the other hand, the denial by the defendant (and by his codefendant) was sufficient, if believed by the trial court, to raise a reasonable doubt as to the defendant's guilt. This conflict of testimony presented an issue of credibility and the credence to be given the witnesses was for the court to determine. It was in a much better position to evaluate their testimony and to appraise their credibility than is a court of review. Where the guilt or innocence of the defendant depends upon the credibility of conflicting testimony, the finding of the trial court will not be disturbed. People v. Cool, 26 Ill. 2d 255, 186 N.E.2d 254.

The judgment of the Criminal Court is affirmed.

Affirmed.

Schwartz and McCormick, JJ., concur.

48903

41 I A² 125

CHARLES DAWSON, et al.,	)	APPEAL FROM
Plaintiffs-Appellants,)	
v.	)	SUPERIOR COURT
BOARD OF APPEALS OF THE CITY OF)	
CHICAGO and ALICE MAE ZEMKE,	)	COOK COUNTY
Defendants-Appellees.)	

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment order under the Administrative Review Act entered by the Superior Court of Cook County in an order entered by the Zoning Board of Appeals of the City of Chicago to allow the Defendant-Appellee, Alice Mae Zemke, to secure a building permit from the City of Chicago to provide additional means of ingress and egress for a two-story brick six-apartment building located in the City of Chicago.

The Superior Court of Cook County affirmed the order of the Board of Appeals on June 8, 1962.

The Zoning Administrator refused approval of Alice Mae Zemke's application because the proposed improvement did not conform to the requirements of the Chicago Zoning Ordinance, namely, Section 7.5-3, requiring fulfillment of minimum lot area requirements.

A hearing was held with respect to the subject premises at which plaintiffs-appellants objected in person and by petition submitted to the Board. Evidence was taken and at the close of the hearing, the Board of Appeals entered an order overruling the determination of the Zoning Administrator and entered an order in favor of the defendant-appellee.

Plaintiff filed an application for an administrative review of the order of the Board of Appeals in the Superior Court of Cook County, Illinois, where pursuant to a hearing the order of the Board

was affirmed on June 8, 1962.

The only function of the courts in reviewing the order of the Zoning Board of Appeals is to consider the record and determine if the findings and order of the Zoning Board of Appeals are against the manifest weight of the evidence. *Adamek v. Civil Service Commission*, 17 Ill. App.2d 11.

The subject premises were acquired by the defendant in 1949, and are improved by a two-story building which covers substantially the entire lot, the lot being 35 x 125 feet on the northwest corner of 74th Street and St. Lawrence Avenue. The only entrance to the building is on 74th Street. To the west of the entrance is a four-room apartment on each of the two floors. To the east of the entrance there is a three-room apartment in the north portion of the building and a two-room apartment in the south portion of the building on each floor. The application made to the Zoning Administrator was for an entrance fronting on St. Lawrence Avenue to serve the east two two-room apartments. It was made pursuant to an order of the Building Department of the City of Chicago to provide an additional means of ingress and egress. Defendant-appellee states that the building was a six-apartment building when she acquired the building in 1949. Plaintiffs-appellants state the building was a four-**apartment** building when defendant acquired it and that the building was converted into a six-apartment building by defendant in 1953. The records of the Building Department show that a complaint was made by the Park Manor Neighbors, a community organization, concerning a conversion to the building in 1953. The records also show that no permit was ever issued to convert the building from four to six apartments at any time. The building is located in an R-3 General Residence District Zone under the Chicago Zoning

Ordinance as amended in 1957.

Joseph Fitzgerald, a deputy commissioner, of the Department of Buildings stated that the Building Department has no record of any permits being issued on the building in 1954. A notice was sent to Mrs. Zemke concerning an illegal conversion based on a complaint filed by the Park Manor Neighbors.

Mrs. Zemke testified that she purchased the premises in 1949 and at that time there were six apartments; and that the premises have been in the same condition since the time of the purchase, except for certain repairs after a fire in 1953.

Herman J. Muth, associated with the Progressive Building Contractors, certified that the fire repairs were made on November 21, 1953 and at that time there were six apartments in the building at 554-56 E. 74th Street. Charles Danovsky made a statement to the effect that he was the janitor at the premises in the month of September, 1950 and at that time there were six apartments in the building. The decision of the Board of Appeals is not contrary to the manifest weight of the evidence.

The findings and conclusions of the Zoning Board of Appeals on questions of fact are considered prima facie, true and correct, and the courts will not disturb them unless such findings and conclusions are arbitrary or constitute an abuse of discretion or are without substantial foundation in the evidence. The courts will not substitute their judgment for that of the Zoning Board of Appeals. Smith-Hurd Ill. Annot. Stat. (1956), ch. 110, § 274; Board of Ed. v. County Board of School Trustees, 32 Ill. App.2d 1.

The judgment of the trial court is affirmed.

AFFIRMED.

BURKE, J., and FRIEND, J., concur.

48885

41 IA-126

RALPH H. FREUND and FREUND DREDGING
INC., a Delaware corporation,

Plaintiffs-Appellees,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES and MARK HORWITZ,

Defendants.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,

Defendant-Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying the petition of defendant, The Equitable Life Assurance Society of the United States, filed under Section 72 of the Civil Practice Act (Ill. Rev. Stat., ch. 110, § 72 (1961)), to vacate a default judgment in favor of plaintiffs in the sum of \$4527, consisting of \$4000, the alleged surrender value of a life insurance policy, \$500 attorneys' fees, and \$27 costs.

The life insurance policy was issued by defendant to Ralph H. Freund and assigned by him to Mark Horwitz (who originally was a defendant but was subsequently dismissed) as one of the conditions of a contract entered into by Freund Dredging Inc. and Horwitz. On June 28, 1961 Freund Dredging Inc. terminated the contract, contending that Horwitz had failed to perform his obligations. Ralph Freund then asserted that he was entitled to the policy, and on numerous occasions requested Horwitz to return it. Notwithstanding Horwitz's refusal to return the policy, Freund demanded that defendant Equitable pay him the surrender value thereof. Defendant

refused to do so until it obtained a release of the assignment to Horwitz and the surrender of the policy by Horwitz, or until an adjudication in a proper legal proceeding binding on Horwitz determined that plaintiffs were entitled to the surrender value of the policy.

Plaintiffs then instituted the instant suit against Equitable and Horwitz, seeking to obtain the cash surrender value of the policy, attorneys' fees, interest and costs. An agent of defendant Equitable in Chicago was served on December 18, 1961. He prepared a brief memorandum of the fact of such service and enclosed it, together with the summons and complaint, in an envelope addressed to defendant's law department in New York City. The envelope was placed in a mail basket, and under defendant's established office procedure, would have been picked up and deposited in the United States mail. The letter was not received by defendant's law department and consequently no appearance or defense was made by defendant within the statutory time.

On February 9, 1962, plaintiffs, without notice to defendant Equitable, appeared and secured the entry of a default order for want of appearance of defendant. On February 19, 1962, again without notice to defendant, plaintiffs appeared, took a nonsuit as to Horwitz, who had not been served, and secured the entry of a default judgment against defendant Equitable. Plaintiff delayed informing defendant of the default judgment until April 4, 1962, some 54 days after it had been entered. On May 3, 1962, defendant

filed its petition to vacate that judgment. From the denial of its petition, defendant appeals.

Defendant argues that Horwitz, as the assignee of the policy, was an indispensable party and that therefore the trial court committed error in proceeding to judgment without his being joined. The rule is well settled that the court should upon its own motion take notice of the omission of an indispensable party and require the omitted party to be made a party to the litigation, even though no objection is made by any party litigant. Hobbs v. Pinnell, 17 Ill. 2d 535, 162 N.E.2d 361. Until the indispensable party is joined, the court should not proceed to a decision on the merits. Hobbs v. Pinnell, supra.

From the facts appearing on the face of the complaint, Horwitz is an assignee of the policy who retained its physical possession and asserted a continuing right and interest in it. Since he was not effectively joined as a party his interest in the policy has not been foreclosed. In a subsequent suit defendant may be forced again to pay the surrender value of the policy. Horwitz is an indispensable party and the court should not have proceeded until he had been made a party litigant. Hobbs v. Pinnell, supra. Such error of law apparent from the complaint can be raised in a petition filed under Section 72 of the Civil Practice Act (Ill. Rev. Stat., ch. 110, § 72 (1961)); Collins v. Collins, 14 Ill. 2d 178, 151 N.E.2d 813.

The letter which defendant's agent sent to its

law department in New York, together with the summons and complaint, apparently was lost. Mail is recognized as a diligent means of serving and transmitting suit papers, even though there are occasions on which it miscarries or is lost. Dann v. Gumbiner, 29 Ill. App. 2d 374, 173 N.E.2d 525; Webb v. Pacific Mutual Life Ins. Co., 348 Ill. App. 411, 415, 109 N.E.2d 258, 259; Illinois Supreme Court Rule 7(2)(c); Uniform Rules for Circuit and Superior Courts of Cook County, Par. 2.1(d).

Plaintiffs were informed by defendant Equitable that no payment of surrender value would be made until determination of the respective rights of Horwitz and plaintiffs to the policy. Plaintiffs knew that defendant intended to resist any action by them that would permit payment of the surrender value while the assignment and policy remained outstanding. Knowing this, they obtained a default order and a default judgment for \$4527 based on a conjectural surrender value of \$4000. They did not attempt by deposition or interrogatory directed to defendant Equitable to determine the correct amount, which appears to be \$3340.70. Such procedure would of course have advised defendant of the pendency of the suit and enabled it to defend.

Plaintiffs obtained the default judgment after the suit was dismissed as to Horwitz, without notice to defendant Equitable. Having obtained the default judgment, plaintiffs delayed taking out an execution or otherwise informing defendant until 54 days after the entry thereof. Plaintiffs'

conduct casts a cloud upon the proceedings. Elfman v. Evanston Bus Co., Ill. Sup. Ct. Opinion No. 37527, filed January 1963; Jansma Transport Inc. v. Torino Baking Co., 27 Ill. App. 2d 347, 169 N.E.2d 829; Dann v. Gumbiner, 29 Ill. App. 2d 374, 173 N.E.2d 535. All this effectively deprived defendant of the opportunity to appear and protect itself against double liability on the same claim.

A petition filed under Section 72 of the Civil Practice Act invokes the equitable powers of the court, to the end that one may not enforce a default judgment attended by unfair, unjust or unconscionable circumstances. Ellman v. DeRuiter, 412 Ill. 285, 106 N.E.2d 350; Elfman v. Evanston Bus Co., supra. It is our opinion that defendant's petition and supporting affidavits presents a situation which requires in justice and fairness that defendant be given an opportunity to appear and defend.

The judgment is reversed and the cause is remanded with directions to allow defendant's petition to vacate the judgment, and for such other and further proceedings as are not inconsistent with the views herein expressed.

Judgment reversed and cause
remanded with directions.

Dempsey, P.J., and McCormick, J., concur.

Abstract only.

41 IA² 127

48919

MERLIN MARKIEWICZ and DORIS
MARKIEWICZ,

Appellees,

v.

CITY OF DES PLAINES, a Municipal
Corporation,

Appellant.

)
)
) APPEAL FROM
)
) CIRCUIT COURT
)
) COOK COUNTY.
)
)
)

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

The plaintiffs filed a suit in the Circuit Court of Cook County February 26, 1962 asking the court to enter a declaratory judgment that certain provisions in the Des Plaines zoning ordinance of 1960 be held not to apply to the plaintiffs' property, and that the defendant, City of Des Plaines, be enjoined from attempting to enforce said provisions against the plaintiffs. The defendant filed an answer to the complaint and filed a counterclaim against the plaintiffs in the original suit asking that the plaintiffs be ordered to bring that portion of their property on which buildings had been erected into conformity with the city code of the defendant. The plaintiffs filed a motion to strike the counterclaim and filed a motion for summary judgment. On July 3, 1962 the trial court entered a judgment in accordance with the prayer of the plaintiffs, finding that the provisions of the zoning ordinance of the City of Des Plaines did not apply to the plaintiffs' property, and enjoined the defendant from interfering with the plaintiffs' erecting apartment buildings on the said property. The defendant filed a notice of appeal July 16th, and on July 18th, on motion of

the plaintiffs, the trial court entered an order continuing plaintiffs' motion to strike the defendant's counterclaim.

The plaintiffs were the owners of certain property within the City of Des Plaines. The property in question is bounded by Howard Street on the north, Highland Drive on the south, Ash Street on the west, and Pine Street on the east. It contains twenty lots which under the Des Plaines zoning ordinance of 1960 were zoned as multiple family residences. The plaintiffs had previously erected three apartment buildings on the west ten lots. These buildings are the subject matter of the counterclaim.

The trial court in its judgment found, among other things, that the lots which are the subject of the suit were included in a plat of subdivision approved by the city council of the defendant on April 6, 1959 and recorded June 6, 1960; that each and every lot of the subject property has frontage of 56 feet or more and a lot depth of 137.37 feet or more, and a lot area of 7,692.72 or more square feet; that the subject property is located within a district zoned as R-4 multiple family residence district, which permits apartment buildings; that the plaintiffs had filed a petition with the zoning board of appeals of the City of Des Plaines requesting that a variation be granted to permit one dwelling unit for each 1400 square feet of land area instead of 2800 square feet of land area, which petition was denied; that section 3D.4, "Area," of the zoning ordinance of the City of Des Plaines of 1960 provides as follows:

"Except as hereinafter provided, every dwelling herein-after erected, relocated or reconstructed shall be located upon lots containing the following areas:

- (a) The area regulations for single-family and two-family dwellings are the same as in the R-3 Two-Family Residence District.
- (b) For uses other than single-family and two-family dwellings, no building or premises shall be used, unless a minimum lot frontage of 45 feet, and a minimum of 2800 square feet of lot area per dwelling unit, are provided."

The judgment further finds that the City of Des Plaines zoning ordinance provided in Article I, "Rules and Definitions," the following:

"Bulk. 'Bulk' is the term used to indicate the size and setbacks of buildings or structures and the location of same with respect to one another, and includes the following:

- (a) Size and height of buildings;
- (b) Location of exterior walls at all levels in relation to lot lines, street or other buildings;
- (c) Gross floor area of buildings in relation to lot area (floor area ratio);
- (d) All open spaces allocated to buildings;
- (e) Amount of lot area provided per dwelling unit."

The judgment further finds that the zoning ordinance provided, in section 7F.6, "Exceptions to Bulk Regulations," as follows:

"Exceptions to Bulk Regulations. The area requirements of Sections 3A, 3B, 3C and 3D of Article III above shall not apply to:

- (1) Any lot of record in a subdivision, the plat of which was approved by the City Council of the City of Des Plaines, Illinois, after March 3, 1941.
- (2) Any lot of record having a frontage of 45 feet or more and having a depth of 100 feet or more provided the lot has an area of not less than 5000 square feet.

- (3) Any building site having a frontage of 45 feet or more and having a depth of 100 feet or more with an area of not less than 5000 square feet made by the combination of a smaller lot of record with part or parts of one or more other lots of record.

- (4) * * *

In the judgment the court finds that the plaintiffs' real estate involved in the suit "is contained in a plat of subdivision approved by the City Council of the City of Des Plaines after March 3, 1941 * * * and by reason of the fact that the lots owned by the Plaintiffs and involved in this cause have a frontage in excess of 45 feet and a depth of more than 100 feet and a square foot area of more than 5000 feet, the Plaintiffs' property is excepted and not controlled by the provisions of sub-paragraph (b) of Section 3D.4 entitled 'AREA' of the Des Plaines Zoning Ordinance of 1960." The court then entered a judgment finding that the ordinance expressly exempts plaintiffs' property from the requirement of 2800 square feet of land area per dwelling unit and that the plaintiffs are entitled to erect apartment buildings on their property without any regard to land area requirements per dwelling unit. The judgment enjoined the City of Des Plaines and its officials from attempting to prohibit the plaintiffs from erecting apartment buildings on the said real estate without regard to the number of square feet of land area per dwelling unit "upon compliance by the Plaintiffs with all other valid existing ordinances of the City of Des Plaines."

As we have pointed out, this cause is still pending in the Circuit Court of Cook County. The motion to strike the

counterclaim has been continued by the Circuit Court. Section 50(2) of the Practice Act provides that where there are multiple parties or multiple claims for relief involved in an action the court may enter a final order, judgment or decree as to one or more, but fewer than all, of the parties or claims only upon an express finding that there is no just reason for delaying enforcement or appeal, and without such finding any such order is not appealable and is subject to revision at any time before the entry of an order, judgment or decree adjudicating all the claims, rights and liabilities of the parties. In the case before us no such order was entered. In Weidler v. Westinghouse Elec. Corp., 37 Ill.App.2d 95, 185 N.E.2d 100, we had occasion to consider a similar situation. That case involved a counterclaim on which the jury did not return a verdict. We held that under the decision of the Supreme Court in Ariola v. Nigro, 13 Ill.2d 200, 148 N.E.2d 787, the appeal must be dismissed. In the Ariola case the court dismissed the appeal, but the court said particularly in the formative stages of proceedings under section 50(2) it would entertain a new appeal upon the entry of the new judgment and an express finding that no just reason existed for delaying the appeal. In O'Hara v. Carrillo, 18 Ill.App.2d 106, 151 N.E.2d 449, the court laid down substantially the same rule. In the Weidler case the court said:

"Six and one-half years have elapsed since the effective date of the statute and we feel it is time to discontinue the procedure temporarily permitted in Ariola and O'Hara—a procedure which encourages appeals because the trial court invariably feels impelled to enter the order when invited to do so by the reviewing court. It must be presumed that attorneys are now familiar with the provisions of the

statute and with the decisions interpreting them. If the past procedure is further approved it will soon become routine practice; what was thought to be temporary will have become permanently imbedded in our case law, the statute will become meaningless and one of its primary purposes nullified."

Also see Simon v. Simon, 37 Ill.App.2d 100, 185 N.E.2d 111.

In the instant case this court during oral argument on its own motion raised the question of the application of section 50(2). At that time counsel for both parties stated that they were anxious to have the court enter a judgment ~~either~~ affirming or reversing the judgment of the trial court. It is our opinion that under the Supreme Court and Appellate Court decisions a failure to comply with section 50(2) is jurisdictional in its nature and this court has no power to enter a binding judgment. However we feel that it would be proper to state some of the fundamental rules involved in the case before us.

We are requested to interpret and construe an ordinance of the City of Des Plaines. It has been held that the rules for the construction of an ordinance are the same as those applied in the construction of a statute. Dean Milk Co. v. City of Chicago, 385 Ill. 565, 53 N.E.2d 612. A statute which is plain and definite in its terms should not be the subject of construction by the court. The only time when it is necessary for the court to construe a statute is when the statute is ambiguous. Bergeson v. Mullinix, 399 Ill. 470, 78 N.E.2d 297.

The defendant here admits that the exceptions in the ordinance applying to uses other than single family or two family dwellings were included in the ordinance by mistake

and that the intention was to make them applicable only to single family and two family dwellings. It argues that because the purpose of the zoning ordinance is to provide for the construction of dwellings where there is adequate light and air this court should hold that the ordinance is not applicable to multiple family dwellings. To so hold would be in effect requiring this court to draft an ordinance for the City of Des Plaines. In Belfield v. Coop, 8 Ill.2d 293, 134 N.E.2d 249, the court said:

"It is a primary rule in the interpretation and construction of statutes that the intention of the legislature should be ascertained and given effect. (People v. Price, 257 Ill. 587; 82 C.J.S., sec. 311.) 'If in a statute there is neither ambiguity nor room for construction, the intention of the legislature must be held free from doubt. What the framers of the statute would have done had it been in their minds that a case like the one here under consideration would arise is not the point in dispute.' (People ex rel. Fyfe v. Barnett, 319 Ill. 403, 408.) The only legitimate function of the courts is to declare and enforce the law as enacted by the legislature, to interpret the language used by the legislature where it requires interpretation, and not to annex new provisions or substitute different ones, or read into a statute exceptions, limitations, or conditions which depart from its plain meaning. (People v. Boreman, 401 Ill. 566; Wall v. Pfanschmidt, 265 Ill. 180.) The language of the statute in question is certain and unambiguous and this court is not warranted in reading into it an exception which the legislature did not see fit to make."

In Bismarck Hotel Co. v. Petriko, 21 Ill.2d 481, 173 N.E.2d 509, the court said:

"There is no rule of construction which authorizes us to declare that the legislature did not mean what the plain language of a statute imparts, (Western National Bank of Cicero v. Village of Kildeer, 19 Ill.2d 342; Husser v. Fouth, 386 Ill. 188,) * * *."

It is of course the rule that it is the intention of the lawmaking body which controls and that a statute should

not be so construed as to defeat that intention. In 34 I.L.P. Statutes, sec. 113, it is stated:

"To ascertain the meaning of a statute, the court must seek and, if possible, find the intention of the General Assembly in the words used in the statute, and where the language used in the statute is varied and ambiguous, or uncertain, the court, in ascertaining the legislative intent, may look not only to the language but also to the nature and subject matter of the act, the occasion, reason, or necessity therefor, and * * * the object to be accomplished thereby."

The ordinance adopted by the City of Des Plaines in the case before us is not ambiguous, nor can it be said to be an unreasonable exercise of the powers granted to the said city. The fact that the plaintiffs had previously erected buildings on their property in accordance with said ordinance, and the further fact that in the instant case they had applied to the zoning board of appeals of the City of Des Plaines for a variation, can have no effect.

The appeal from the judgment of the Circuit Court of Cook County is dismissed.

Appeal dismissed.

Dempsey, P.J., and Schwartz, J., concur.

Abstract only.

Adv 41 #1

Abstract

1st DIVISION
41 IA² 137

NO. 11628

Abstract

Agenda 1

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A.D. 1962

FILED
MAY 6 - 1963

PAUL V. WUNDER
Clerk Appellate Court Second District

CHARLES RUSSELL SUGDEN,

Plaintiff-Appellee,

vs.

FLORENCE EDITH SUGDEN,

Defendant-Appellant.

Appeal from the
Circuit Court,
Lake County.

McNEAL, P.J. -

The Circuit Court of Lake County entered a decree finding the defendant, Florence Edith Sugden, guilty of habitual drunkenness and granting a divorce to the plaintiff, Charles Russell Sugden. Defendant petitioned to vacate and set aside the decree under section 72 of the Civil Practice Act and to declare void a property settlement included in the decree. From an order denying her petitions, defendant appealed.

The parties were married on July 30, 1930, and lived together until July 1, 1960. They had no children. The decree of divorce was entered on March 9, 1961. Incorporated in the decree was a property settlement made by the parties on March 7, 1961. Briefly, the settlement required plaintiff to pay defendant a lump sum of \$28,000, payable at the rate of \$400 a month for six months and thereafter at the rate of \$250 a month until the total amount was paid, or until her death or remarriage. The parties owned in joint tenancy a home in Deerfield worth \$32,000 and an adjacent lot worth \$11,000. They agreed to offer the house and lot for sale, to sell the same for not less than \$40,000, and to divide the net proceeds. It was agreed that 483 shares of stock would be divided equally. He received as his property a Hi-Fi phonograph, a power launch, and a 1960 Ford, and she took as her separate property the household goods, a riding horse named "Kimberly" and a 1958 Ford.

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JAN 11 1964

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

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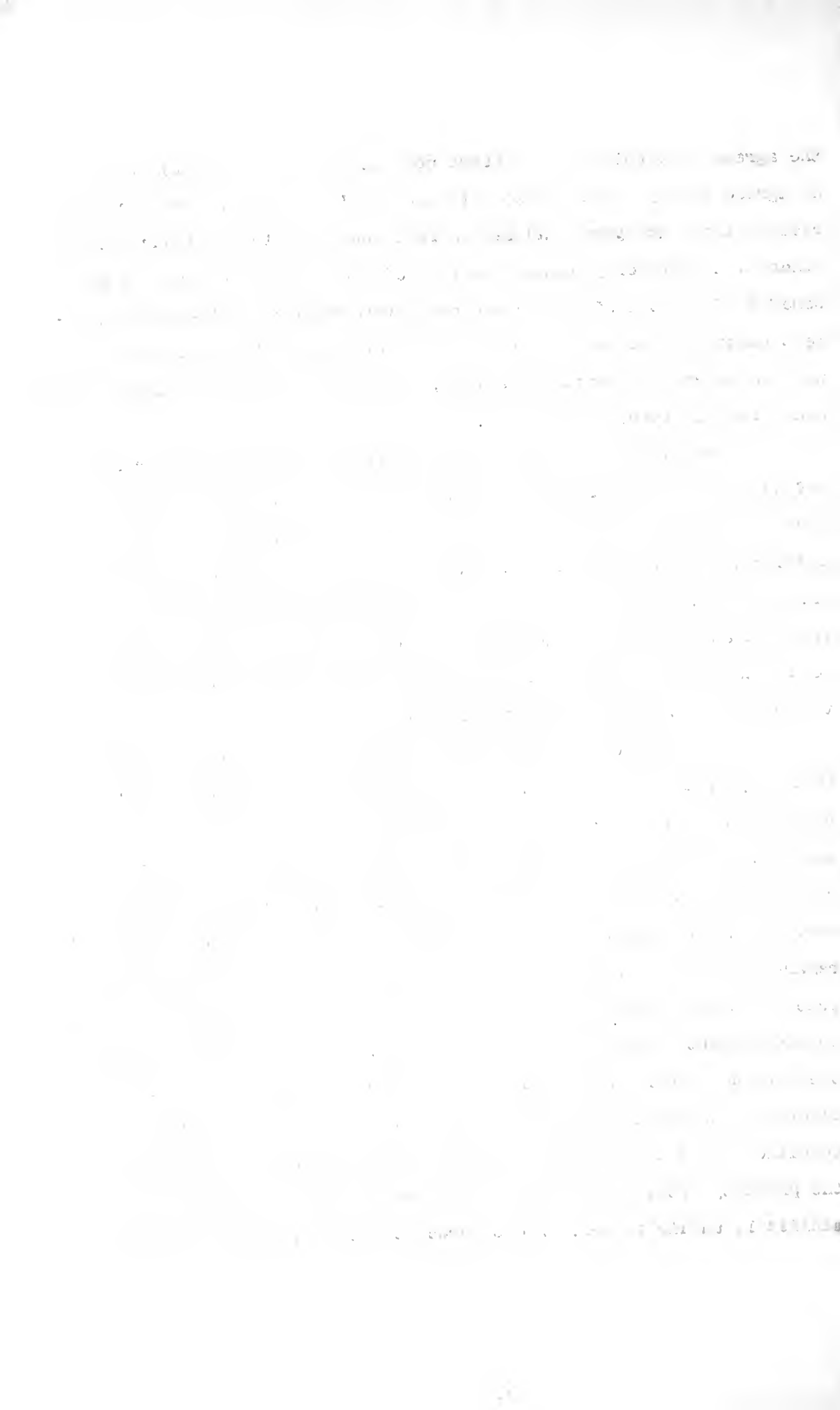
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She agreed to vacate the residence no later than June 15, 1961, and he agreed to pay a fee of \$1500 to his wife's attorney. The agreement recited that each party had made a full and complete disclosure to the other of all property owned by either of them, that each party had the benefit of counsel of his or her respective attorneys, that the agreement contained the entire understanding of the parties, and that there were no representations, warranties, promises, covenants or undertakings other than as therein set forth.

On August 7, 1961, plaintiff filed a petition for a rule on defendant to show cause why she should not be punished for contempt for her failure and refusal to vacate the home as provided by the agreement and the decree. Mr. Arthur C. Holt, who was substituted for Mr. George L. Reilly as attorney for defendant, answered the petition for rule and filed a cross-petition to declare the property settlement void, and also a petition to vacate and set aside the decree pursuant to section 72 of the Civil Practice Act.

In her petitions defendant alleged that from the time of their separation until the entry of the decree, plaintiff led her to believe that the separation was temporary and that after a year had expired, probably the parties would get back together by way of reconciliation, that the day after the decree was entered plaintiff married another woman, and that defendant had learned since plaintiff's remarriage that he had consorted with the other woman on many occasions prior to their separation, contrary to his testimony on the trial that he had conducted himself as a good husband. She also asserted that she had been under the care of at least three physicians for nervous disorders and menopause, that she was not in a mental or nervous condition to be able to know the import of her actions in executing the property settlement, and that the terms of the agreement were manifestly unfair to her. She offered to return any and all benefits



received by virtue of the decree and the property settlement. Plaintiff answered defendant's petitions and denied her allegations except the remarriage. On the issues so made, the court heard the testimony of the parties and other witnesses, denied defendant's petitions, and ordered her to vacate the premises and to pay her proportionate share of the taxes. This appeal followed.

From the evidence it appears that during the two years prior to the separation in July, 1960, defendant had become a periodical drinker. She would drink heavily for 10 days to 3 weeks, and then for 2 or 3 weeks she wouldn't drink at all. During these bouts her husband provided nursing care for her, and in May, 1960 he put her in a sanitarium for two weeks. On July 11 and for about a week thereafter Dr. Foelsch treated defendant for alcoholism, and then referred her to Dr. Patlak, a psychiatrist. Defendant was under his care from July 22 to December 12, 1960, and in a hospital at Park Ridge from July 22 to August 8, September 2 until September 11, and from October 21 to October 27. Dr. Patlak also saw defendant frequently as an out-patient when she was not in the hospital. When he first saw her she was depressed, and she was still depressed in December, but not with the same intensity. She had no delusions or hallucinations, her memory and speech were normal, and she was above average in intelligence. Dr. Patlak did not believe that she had alcoholism, but he did prescribe antabuse, which is usually given to people who drink to excess, he signed a hospital record indicating alcoholism as the number 1 impression upon her first admission there, and he testified that the last time he saw her she was in the AA program which was doing her a great deal of good. At that time he told her she had to make a choice between continuing to see him and paying for her visits or her horse, and she chose the horse.

Defendant went to Florida and after remaining there for three weeks returned a week after New Year's. On February 1, 1961 she started teaching girls physical education at a junior high school for \$5900 a year. She was off from work with pneumonia from February 8 to

the 16th, during which she was treated by Dr. Foelsch. He also examined her in August, 1961 in connection with her employment, and found that she was anemic but that she was able to perform her duties as a physical education teacher.

It is against this background of events that we consider the evidence relative to defendant's contentions that she was unable to understand the property settlement and that she was led to believe that there would be a reconciliation. She testified that the first time she saw her husband after their separation was on August 3 or 9, 1960, when she and her attorney Rinella met plaintiff and his attorney, William Holmquist, at the latter's office. Mr. Rinella asked plaintiff if he would consider a reconciliation and he said, "No, not at this time." She said to him "Will you ever come back, Russell?" He replied "Maybe in a year." She never heard her husband express that sentiment at any other time. In October, when she received a letter from her attorney, George Reilly, relative to a property settlement, she called her husband on the telephone and asked him if he would consider a reconciliation, and he said, "Not at this time." In November, 1960 she asked him if he would come back and he told her not to count on it.

Defendant never discussed the property settlement personally with her husband and his attorney; that discussion was all done through her attorney. Mr. George Reilly represented her from September, 1960 until April or May of 1961. He filed an answer for her on September 30, 1960. In early October he discussed the property settlement with plaintiff's attorney, William Holmquist, and on October 17 Mr. Holmquist proposed a settlement in a letter to Mr. Reilly. The original proposal provided for a lump sum of \$14,400 to be paid at \$100 a month over twelve years. Mr. Reilly had several conferences with defendant personally in his office and by telephone. She rejected the original proposal and made counter-proposals. Except for the amount of the settlement, which was increased from \$14,400 to \$28,000, and some other minor provisions, the final agreement was substantially in the same form as

originally submitted. According to Mr. Reilly's testimony, the settlement was the result of negotiations by the parties which started in October, 1960 and extended until March, 1961. Defendant executed the agreement in Mr. Reilly's office in the presence of Mr. Holmquist, and Mr. Kenneth Shorts, who was Mr. Reilly's associate. Mr. Shorts testified that he had two or three conferences and several phone conversations with her in connection with the agreement and the divorce action, and that there was nothing about defendant to indicate that she might be mentally ill or in need of mental treatment.

Where parties do not rely upon the equity powers of the court for the adjustment of their marital rights so far as their property is concerned, but do what they have a legal right to do and adjust those rights by mutual agreement, they are concluded by their agreement in the absence of fraud. *Smith v. Smith*, 334 Ill. 370, 379. It has long been settled that parties to a divorce suit may voluntarily adjust their property interests and the amount, if any, to be paid as alimony; and that when such agreements are made part of the decree, the parties are concluded thereby. *Guyton v. Guyton*, 17 Ill. 2d 439, 444.

The record in the instant case contains no allegation and no evidence of fraud or coercion in connection with the execution of the settlement agreement and no evidence indicating that the terms of the settlement were so unfair as to make it inequitable. Although defendant may have been suffering from alcoholism during the summer of 1960 and until Dr. Patlak's treatments became effective, there is no indication that this condition impaired her ability to understand the agreement while it was under consideration in the latter part of 1960 or when it was executed on March 7, 1961. Defendant's memory was normal and she was above average intelligence. The evidence tends to show that she was adequately and competently represented by her attorneys during the negotiations which produced the settlement agreement and substantially increased the amount of the lump sum decreed against

plaintiff. There is no reasonable basis in the evidence to support defendant's contention that plaintiff led her to believe that there would be a reconciliation. When the proposal for settlement stood at \$14,400, plaintiff intimated that they might get together by his "not at this time" and "maybe in a year" responses to her suggestions of reconciliation, but there was no such intimation after November, 1960 when he told her not to count on reconciliation and after the consideration for the settlement reached \$28,000. We find no error in the trial court's denial of defendant's petition to declare the property settlement void.

Defendant also contends that the finding in the decree and plaintiff's testimony that he had conducted himself as a good husband were not true because he had gone out socially with his office secretary, Barbara Potter, many times before the divorce, blood tests were taken for their marriage a day or so before the decree was entered, and they were married two days thereafter, and therefore that the trial court should have vacated the decree under section 72 of the Civil Practice Act.

The purpose of a petition or motion under section 72 of the Civil Practice Act is to bring before the court rendering the judgment matters of fact not appearing in the record which, if known to the court at the time the judgment was entered, would have prevented its rendition. The errors of fact which the writ may be employed to correct include such matters as a valid defense which existed on the facts of the case but which, without negligence on the part of the defendant, was not made, having been prevented through duress, fraud or by excusable mistake. *Glenn v. The People*, 9 Ill. 2d 335, 340. However, it has always been held that errors of fact which could be made the basis of the motion are facts which, if known to the court, would have prevented the entry of the judgment, and not the lack of knowledge on the part of the court of facts constituting a cause of action or a defense to it. *Loew v. Krauspe*, 320 Ill. 244, 250.

plaintiff. There is no responsibility on the part of the defendant's contention that plaintiff had not to have a fair trial.

It is, of course, a well-known fact that the defendant's contention is not a new one, but has been raised in many cases.

When the defendant's contention is raised, it is usually in connection with the question of the admissibility of evidence.

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In support of her contention that plaintiff was consorting with Barbara Potter before the divorce, defendant called Seth Gooder, who started going out with defendant right after the divorce and had been seeing her regularly since then. Mr. Gooder testified that he dated Barbara in the spring and until September, 1960, that he discussed marriage with her in May or June, and that on the Friday after July 4, 1960, Barbara told him that she had had "an affair" with Dr. Sugden. On cross-examination by defendant's counsel, Barbara Potter, now Sugden, testified that she did not tell Mr. Gooder that she had had an affair with Dr. Sugden. If any improper conduct can be implied by "an affair", both Barbara and Dr. Sugden testified that there was no cohabitation or sexual intercourse with the other prior to their marriage. On this record the trial court was in the best position to judge the credibility of the witnesses and the weight to be given their testimony on this question of fact. The finding of the chancellor that defendant failed in her burden of proof will not be disturbed unless against the manifest weight of the evidence. Long v. Long, 15 Ill. App. 2d 276, 282. We cannot say that the trial court's decision denying defendant's petition was against the manifest weight of the evidence.

The order of the Circuit Court of Lake County denying defendant's cross-petition and her petition under section 72 of the Civil Practice Act is affirmed.

Affirmed.

DOVE, J., and SMITH, J., concur.

48921

41 IA² 216

DEWEY PACCAGNINI,

Appellee,

v.

ALFRED S. BORT and MARIE BORT,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff seeks to recover \$3,000, alleged to have been deposited with defendants as security for rent of a building leased by defendants to plaintiff for his restaurant business. Defendants appeal from a judgment against them in a non-jury trial.

Plaintiff filed no brief and has not participated in the instant appeal. No questions are raised on the pleadings. The evidence consists of the testimony of plaintiff and exhibits, which include the lease and a rider.

The lease provides for a monthly rental of \$150 for a term of five years from March 5, 1953. On September 26, 1955, the premises were badly damaged by fire. As lessors, defendants exercised a right given them by the lease to terminate the lease if the premises "shall be rendered untenable by fire."

At the trial, it was stipulated that plaintiff gave defendants \$3,000 at the time of the execution of the lease on March 5, 1953. The issue was the reason for this payment. Neither the lease nor the rider refers to the \$3,000. Plaintiff

testified that the \$3,000 was "for the security of a five years' lease, security of the rent if I wasn't paying the rent, then he would deduct it from the \$3,000." The court refused an offer of proof by defendants to show that the alleged deposit on rent was, in reality, a payment which plaintiff made to obtain a lease at \$150 a month instead of \$200, and that the consideration for the payment of \$3,000 was the execution of the lease, although, in substance, the \$3,000 was a lump sum payment of \$50 per month over the sixty month term of the lease. The court stated: "You cannot alter the terms of a written instrument by parol evidence." The court then entered judgment against defendants for \$3,000, and defendants appeal.

Defendants contend that it was competent for them to prove, by parol evidence, the consideration for the payment of the \$3,000, and it was improper for the trial court to permit testimony on this point in behalf of plaintiff and reject testimony on this point when offered by the defendants.

Generally, parol evidence is inadmissible to vary, alter, or contradict a written instrument which is complete, unambiguous, valid, and unaffected by fraud or mistake (18 I.L.P., Evidence, §251). This rule applies to an instrument which is absolute on its face and constitutes a consummated and fully executed contract (§254). However, the rule is flexible, and it has many exceptions.

Parol evidence which does not vary or contradict the document under consideration is admissible to establish a fact as to which the instrument is silent (§271). As a general rule, the recitals of a written instrument as to the consideration are not conclusive, and it is competent to inquire into the consideration and show by parol evidence what the true consideration was, provided such evidence does not destroy the legal effect of the instrument or vary its terms, and the recital of consideration is not of a contractual nature. It may be shown that no consideration was in fact paid or received or that the consideration was greater or less than or different from that which is expressed in the instrument (§272).

We question any application of the parol evidence rule to the \$3,000 transaction. The complaint alleged it was deposited with defendants as "collateral for the rental of the said premises." Defendants' answer denies that it "was deposited as collateral," and states that the consideration for the payment "was the execution of the present lease." Since the lease was completely silent as to the \$3,000 payment, the court was required to receive evidence as to why the payment was made. In the absence of any writing recording the reason for the transaction, testimony was required to determine the legal significance of the payment. Obviously the testimony should be that of the parties who participated in the transaction and any competent witnesses. In refusing to hear the testimony offered by

-4-

defendants as to the \$3,000 transaction, or permitting the cross examination of plaintiff, we believe defendants were not accorded a fair trial.

Defendants' evidence, whether admissible as an exception to the parol evidence rule, or as evidence of a collateral parol agreement, should have been admitted to show the purpose of the payment of \$3,000, "a fact as to which the instrument is silent."

For the reasons stated, the judgment is reversed and the cause is remanded for a new trial in accordance with the views expressed herein.

REVERSED AND REMANDED.

BURMAN, P.J., and ENGLISH, J., concur.

Abstract only.

41 IA²/233

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10448

Agenda No. 14

Ruth Gerler,

Plaintiff-Appellee,

vs.

Margaret F. Cooley,

Defendant-Appellant.

Appeal from the
Circuit Court of
Champaign County.

REYNOLDS, J.

This cause arose out of a collision between an automobile driven by Margaret F. Cooley and one driven by William Gerler. The collision took place at about 1:00 o'clock a.m. June 5, 1960, on U.S. Route 45 approximately four miles north of Tuscola. Both automobiles were proceeding to the north, the Cooley automobile about one block ahead of the Gerler automobile. It was a warm summer night. There was some cloudiness and light-

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ning. The Cooley automobile ran into a dust storm and while in the dust storm was struck in the rear by the Gerler automobile. Almost immediately thereafter, the Gerler automobile was struck again by the south-bound automobile of William Arbrust. Mrs. Gerler was severely injured. Both the Cooley automobile and the Gerler automobile were in the dust storm when the collision occurred. Mrs. Cooley and her husband James Cooley testified Mrs. Cooley had slowed to about 20 to 25 miles per hour, but were still moving when struck by the Gerler automobile. Mr. Gerler and Mrs. Gerler testified the Cooley automobile was stopped on the highway. There was no contention on the part of either Mrs. Cooley or Mr. Gerler that either car had been driven off on the shoulder at any time prior to the collision.

Mrs. Gerler brought suit against Mr. Cooley; Mrs. Cooley counterclaimed against Ruth Gerler and her husband, William Gerler, and James Cooley intervened and counterclaimed against William Gerler. There were other claims involved in the case at one time or other, but the cause narrowed down to the three above

noted. The cause was tried before a jury and the jury found for the plaintiff, Ruth Gerler, and against the Defendant, Margaret F. Cooley, and assessed plaintiff's damages at \$17,500.00. Ruth Gerler had executed a covenant not to sue to William Armbrust for \$2,500.00 and the trial court in entering judgment for Ruth Gerler against Margaret F. Cooley, allowed a set-off of \$2,500.00 as a result of the covenant. The jury found for counterclaimant, James Cooley, and against counter-defendant, William Gerler, and assessed counterclaimant's damages at \$1,850.00. The jury also found the issues in favor of the counter-defendant, William Gerler, and against the counter-claimant, Margaret F. Cooley. Only the judgment against Margaret F. Cooley was appealed.

The defendant, Margaret F. Cooley, urges as grounds for appeal that the verdict is against the manifest weight of the evidence; the jury was misled and confused by erroneous rulings of the court on the trial and the trial judge erred in his rulings on the jury instructions.

The contention that the verdict of the jury was against

the manifest weight of the evidence seems to be based upon the fact that the jury held that William Gerler was negligent as to the claim of James Cooley. The evidence was conflicting and the question of negligence presents a close question. The defendant tacitly admits the evidence presented a close question in her argument on instructions when the case of Parkin v. Rigdon 1 Ill. App. 2d 586, was quoted. It has long been the rule that a reviewing court will not interpose its judgment for that of the jury where an issue of fact is involved, unless the verdict is clearly against the manifest weight of the evidence. The issue between the plaintiff, Ruth Gerler, and the defendant, Margaret F. Cooley, and the issue between the counter-claimant, James Cooley, and the counter-defendant, William Gerler, involved entirely different degrees of care and caution, and the finding that William Gerler was negligent in one, in no way was decisive and controlling in the other. This court sees no merit in the contention of defendant that the verdict of the jury was against the manifest weight of the evidence.

The second contention, that the court permitted the

plaintiff to answer over the objection of defendant the following question: "Q. And did that light move at any time during - that evening when you observed it?" The answer was: "A. No, it did not ****." Just previous to the above question, the plaintiff had testified without objection that she saw the headlight of what she assumed was a car and when she saw it, the light was stopped. She later corrected this under cross-examination to state that what she saw was not a headlight, but a red tail light. The witness, William Gerler, in his testimony, testified without objection, he saw the car with the one tail light "sitting" in front of him, and that the light was "standing". Defendant's argument is that the question asking if the light she saw moved at any time during the time the witness observed the light, was leading and suggests an answer which was prejudicial to the defendant seems farfetched. It is true that a witness must state facts and not draw conclusions or give opinions. International Coal Co.v. Indus. Com. 293 Ill.

524, 532. That is the duty of the jury or court. However, we fail to see the leading nature of the question. The witness had previously testified without objection that she saw the light which was later identified by her as a tail light and that it was stopped. She was then asked if she saw the light move at any time while she observed it and her answer was "No, it did not." The question called for a "yes" or "no" answer. It would seem that the defective answer was merely amplification of a statement previously made by the witness. When she first saw the light on the defendant's car, it was stopped. She did not see it move while she observed it. The question is not leading and certainly it does not suggest the answer thereto by putting it to the mind of the witness the words or thought of such answer, as contended by the defendant. The witness could have answered "yes". The defendant cites the case of The People v. Schladowiller, 315 Ill. 553, where it is held that leading questions, to be incompetent, must refer to material matters and occur where no necessity for them appears, and whether or not such necessity exists is a matter resting largely in the discretion of the trial court, an abuse of which

discretion will amount to prejudicial error. And the court in that case held "Questions merely directing the attention of the witness to the subject matter of the inquiry are not suggestive or leading in any proper sense." Applying the law laid down in that case to the question involved here, the permitting the question to be answered was not prejudicial error. We do not believe the jury was misled thereby.

The defendant contends the testimony of Nikola Milic should not have been permitted for the reason that the witness testified as to conditions which prevailed at the time of the collision as the conditions at the time of the collision. This witness was maintenance foreman for the State of Illinois for eight years; six years on the particular stretch of highway where the collision occurred. He was maintenance foreman in charge of that part of the highway on the date of the collision. He identified photographs introduced as to the location of the collision with respect to signs situated along the highway. He testified he had taken tape measurement of the width of the shoulder on the west side of the highway, both north and south

of the point of collision. These measurements were taken by the witness about a week before the trial, but the witness stated the width of the shoulder had not been changed from the date of the collision to the date of his measurement. In cross examination, the witness admitted that at the time he made the measurements there were no weeds on the shoulder. Photographs showing the condition of the shoulder and highway taken three days after the collision were introduced as Defendant's Exhibits No. 101, 102, and 103. They show no wild weeds or grass on the shoulder. The witness, Ellis, did not testify that there were or were not weeds or grass on the shoulder at the time of the collision. He testified as to the width of the shoulder and that it had not been changed from June 6th, 1960 to a week before the trial. His testimony related only to the minimum measurement width of the west shoulder for a considerable distance both south and north of the point of collision. He had been in charge of the maintenance of this part of the right-of-way for six years, and was well acquainted with the matters to which he testified. His testimony was admissible for what it was worth.

Finally, defendant contends that the trial court erred in refusing to give Defendant's Instruction No. 9a. She argues that this instruction was material to the issue of whether the conduct of William Gerler was the sole cause of the collision. This instruction quoted the Statute as to the driver of a motor vehicle following another more closely than is reasonable and prudent, having due regard for the speed of such vehicle and traffic upon the condition of the highway. This instruction followed the language of Form 60.01 of Illinois Pattern Jury Instructions. Plaintiff contends that the word "the" in the statute was left out and that this omission makes the statute quoted a clumsy statement which could mean anything or nothing. We see no merit in this position. Plaintiff further contends there is no evidence upon which to base the instruction. The trial court stated the instruction was a perfectly good instruction, but he didn't think it was applicable in this case. We agree with the trial court. The evidence showed that the Gerler car followed

the Cooley car for about four miles, being about a block behind it. Until the Cooley car entered the dust storm, the distance between the two vehicles and their speed of 50 miles per hour was maintained. This is not disputed. There is no testimony as to the Gerler car following the Cooley car too closely at any point. Without such testimony, the giving of an instruction on that point would be error, since it is inapplicable to the facts and brings to the attention of the jury a matter not before it. Peterson vs. Chicago & Oak Park Elev. R.R. Co. 260 Ill. 280. Where there is evidence with its reasonable intendments and inferences that justifies the submission of such evidence to the jury, an instruction on the issue is proper. Starck v. C.& N.W. Ry. Co., 4 Ill. 2d 611. Here, there is a total lack of evidence to support the theory of the defendant that William Gerler was following the Cooley automobile too closely for safety. If the trial court had permitted the instruction, it would have introduced an issue not before the jury and could only have resulted in confusing

the jury as to the actual issues. It is true that each party is entitled to jury instructions on his theory of the case, if his evidence tends to prove such facts. Kirchner v. Kuhlman, 334 Ill. App. 339; Markin v. Riedor, 1 Ill. App. 2d 586. In these cases, this right is predicated upon evidence to prove such theory. In the case of Gilman v. Lee, 23 Ill. App. 2d 61, the necessity of proof of an issue before submission of an instruction on such issue is not spelled out, but we regard some evidence of an issue indispensable before giving the instruction.

The judgment of the trial court will be affirmed.

Affirmed.

CARROLL and ROETH, JJ., concur.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A. D. 1963

General No. 10444

Agenda No. 10

CAROL ANN THIESSEN,

Plaintiff-Appellee,

vs.

WABASH RAILROAD COMPANY, a Corpora-
tion, SCHERER FREIGHT LINES, INC.,
a Corporation, and ROBERT A MULLADY,

Defendants.

SCHERER FREIGHT LINES, INC., a cor-
poration, and ROBERT A. MULLADY,

Defendants-Appellants. :

CARROLL, J.

This is an action for damages resulting in a verdict for plaintiff against the defendants, Robert A. Mullady and Scherer Freight Lines, Inc., and a judgment thereon in the sum of Eighteen Thousand (\$18,000.00) Dollars for personal injuries alleged to have been sustained by plaintiff as the result of defendants' negligence. The other original co-defendant, Wabash Railroad, was found not guilty by the jury and the plaintiff has not appealed therefrom. The complaint charges the defendants with negligence in parking a tractor-trailer combination in proximity to a grade crossing, in violation of certain statutes, thereby obstructing plaintiff's view of trains approaching the crossing. These defendants filed motions for directed verdict and post-trial motions. This appeal is from the orders denying such motions and from the judgment entered.

41 I A² 238

On September 21, 1960, at about 10:00 p.m., the plaintiff was injured while riding as a passenger in the right front seat of an automobile operated by one Thomas Theobald, on Carpenter Street at its intersection with Tenth Street and the Wabash Railroad tracks in the City of Springfield, Illinois. Carpenter Street is paved with brick, is about thirty (30) feet wide and runs east and west. Tenth Street is parallel to the railroad tracks and runs in a northerly and southerly direction. The distance between the easterly rail of the tracks to the east curb line of Tenth Street is about fifteen (15) feet. After a brief visit at the home of the plaintiff, Theobald, with plaintiff as a passenger, drove west on Carpenter Street. He was going about twenty-five to thirty miles per hour. Upon approaching the railroad crossing, he slowed down, looked in both directions, and neither saw nor heard a train. As he reached the eastern most rail, he was going about ten miles per hour. About that time, the plaintiff warned Theobald to look out for the train. The train was approaching from the north on the set of tracks immediately to the west of the automobile. In the next instant, the automobile collided with the train and was carried some distance to the south. The left front of the train hit the automobile at its right front wheel. It was carried south and came to rest parallel with the train. Plaintiff was removed by ambulance from the scene to a hospital. The driver, Theobald, testified that he did not see the train when he looked to the north and was not aware of any obstruction to his vision. There was evidence that

the approaching train was a freight train consisting of 99 cars and that it approached Carpenter Street at a speed of ten or twelve miles per hour. The engine was equipped with two headlights, a top headlight that operated in a figure eight motion, below which was a stationary headlight. This stationary light is about ten feet above ground level and the revolving or "Mars" light is about twelve feet above ground level. Both these lights were operating immediately prior to the collision.

Earlier on the evening of the occurrence, defendant, Robert A. Mullady, drove a tractor-trailer, under lease to defendant, Scherer Freight Lines, Inc., from Hammond, Indiana to Springfield. He parked this truck along the east curb of Tenth Street, parallel to the railroad tracks, immediately to the south of another trailer that had been left there previously. The Scherer truck was parked that evening a foot or two from the east curb line of Tenth Street and three or four feet to the north of the sidewalk on the north side of Carpenter. The trailer was about eight feet wide and contained a load of steel, covered with a tarpaulin. Packing of the load caused a hump in the center, approximately two feet higher than the sideboards of the trailer. The distance from the ground level to the top of the hump was eight or nine feet.

The plaintiff testified that as the automobile approached the intersection, she could not see down the track to the north until about the time that the car was right near the tracks, and when she saw the lights from the approaching train, she warned the driver.

A disinterested witness, one James Galloway, testified that he arrived at the scene immediately following the occurrence and stopped his car near the intersection of Carpenter and Tenth Streets. He related that he had been unable to discern the presence of the parked tractor-trailer until after he got out of his car and took some photographs with the aid of flashbulbs. The witness was a professional photographer, as well as a deputy sheriff and coroner. He said that when he was approximately thirty feet west of the easterly rail of the tracks on the north side of Carpenter Street, he looked to the north but could not see down the tracks. He stated that it was his observation that at that time there was nothing obstructing one's view to the north. When he used the flashbulbs, however, he saw for the first time that the tractor-trailer unit blocked out his view of the tracks to the north. He said the trucks were not visible except for the reflection from artificial illumination. There was an overhead street light on a post approximately twenty feet high, but it was apparently insufficient to illuminate the truck. There were no lights burning on either the tractor or the trailer.

At the time of the occurrence, plaintiff was seventeen years of age. She sustained cuts on the right arm and around her right eye. Stitches were required to close the lacerations near her eye. She also sustained fractures of the right arm and left clavicle. Internal fixations and grafting were necessary to reduce

the fractures. She was hospitalized approximately one month. Functionally, the result of the orthopedic operations was good. The plaintiff, however, complains of some difficulty in using her right wrist and hand, and that her left shoulder pains her during changes in the weather. Her wrist is somewhat stiff and is painful to the touch. She testified that she had lost some strength in her hand. She bears a scar below the right eye, across the right eyebrow, on her forehead, and also has a scar on her right arm and near her shoulders and collarbone. Total hospital and medical expenses to the date of trial were approximately Twelve Hundred (\$1,200.00) Dollars. Additional medical expenses will be necessary for removal of the pins and these were estimated at between Seventy-Five Dollars (\$75.00) and One Hundred Dollars (\$100.00). No estimate as to the cost of the anticipated hospitalization charge was given. She was employed at the time of the accident and earned Two Hundred Dollars (\$200.00) per month. She was unable to return to work for six (6) months, after which, she has been steadily employed at the same or increased rate of compensation.

The charges of negligence directed against the defendants in the amended complaint are:

- (1) Carelessly and negligently parking the tractor and trailer upon Tenth Street at its intersection with Carpenter, at a place which blocked the view of trains approaching from the north on the tracks of the railroad company, from persons approaching said tracks from the east.

(2) Carelessly and negligently parking the tractor and trailers within twenty feet of a crosswalk, at an intersection, in violation of Sec. 187 (6) of Chap. 95 $\frac{1}{2}$ Ill. Rev. Stats. 1959.

(3) Carelessly and negligently parking the tractor and trailers within fifty feet of the nearest rail of a railroad crossing, in violation of Sec. 187 (9) of Chap. 95 $\frac{1}{2}$ Ill. Rev. Stats. 1959.

(4) Carelessly and negligently leaving said tractor and trailers standing on said highway between the period from sunset to sunrise, without displaying a light on the front and at the rear, in violation of Sec. 202 of Chap. 95 $\frac{1}{2}$ Ill. Rev. Stats. 1959.

(5) Carelessly and negligently parking said tractor and trailers.

The defendants raise and argue the following points:

(1) That the plaintiff has failed to charge or prove actionable negligence which constituted the proximate cause of plaintiff's damages.

(2) That the court's instructions covering the issues raised, with respect to violation of the statutes, were erroneous because they were not sustained by the evidence.

(3) The verdict is excessive.

It is contended that the proximate cause of the occurrence was the negligence of Thomas Theobald; that the plaintiff's failure to see the oncoming train in time to avoid the collision constituted contributory negligence as a matter of law, and that the

(2) Completely and positively identify the person or persons who were in the vehicle at the time of the offense.

parking of the truck and trailer, in violation of the statute, merely furnished a condition for the occurrence and cannot be said to have constituted the proximate cause of the collision.

The negligence of Theobald, if any, is immaterial so far as the liability of these defendants is concerned. In order to render a party liable for a negligent act, the act must be so related to the injury as to constitute the proximate cause thereof. Independent, concurrent or intervening forces will not break the causal connection, if such intervention itself was probable and foreseeable. What is the proximate cause of an injury is a question for the jury, to be determined from a consideration of all the evidence. Likewise, the question of plaintiff's due care is pre-eminently a question for the jury. The mere fact that the jury might have drawn a different inference, from all the evidence, would not warrant setting aside the verdict. Considering all the evidence, with all reasonable inferences to be drawn therefrom, we cannot say that there was a complete absence of probative facts tending to support the conclusions reached by the jury on the questions of proximate cause and due care. King v Mid-State Freight Lines 6 Ill. App. 2d 159. The defendants contend, however, that the plaintiff was not within the class of persons intended to be protected by the statutes in question and that it was error to submit such alleged violation for consideration by the jury on the ground that the evidence does not sustain the charges and that as a matter of law the alleged violations did not constitute the proximate cause of the occurrence. We think the

parting of the funds and transfer of a portion of the proceeds.

He also furnished a certificate for the amount of \$100,000.

to have completed the purchase of the property.

The certificate of completion, dated July 1, 1911, was as follows:

The property of the State of New York, known as the

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statutes were properly considered. One of the purposes of their enactment is the preventing of obstructions to the view of those approaching a grade crossing in an automobile which obstructions might cause injuries to persons lawfully using the public way. We agree that proof of violations standing alone would not support a recovery unless the negligence involved constituted the proximate cause. We say, however, that the question of proximate cause is itself one to be determined by the jury. The question as to whether or not the resulting injury could have been reasonably foreseen by the defendants, was one of fact to be determined by the jury under proper instructions. From our examination of the record we are convinced that it cannot be said that all reasonable men would agree on the issue of proximate cause, and accordingly, it was not a question of law. Schiff v Oak Park Cleaners and Dyers, Inc. 9 Ill. App. 2d 1.

In view of the out-of-pocket expenses incurred, the nature of the injuries sustained, the period of temporary disability, the attendant pain and suffering, the scars and continuing discomfort, we cannot say that a verdict of Eighteen Thousand Dollars (18,000.00) reflects either passion or prejudice, or that it is excessive. We see no reason to conclude that the verdict represents anything but the result of sober deliberation by a discerning jury under proper instructions.

For the reasons herein indicated we are of the opinion the judgment should be affirmed.

Affirmed

REYNOLDS, P.J. and ROETH, J.,
concur.

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term A.D. 1963

General No. 10440

Agenda No. 7

A

Springfield Marine Bank, a banking
association, a corporation organized
and existing under the laws of
Illinois, and Mesa Realty, Inc., an
Illinois corporation,

Plaintiffs-Appellees,

vs.

Robert Adams and Audrey Adams,

Defendants-Appellants.

Appeal from the
Circuit Court of
Sangamon County

CARROLL, J.

This is a declaratory judgment action brought pursuant to Section 57.1 of the Civil Practice Act (Ill. Rev. Stat. 1961) in which plaintiffs seek a declaration of rights under their written contract with defendants for the purchase of certain real estate. The trial court allowed plaintiffs' motion for judgment on the pleadings and entered an order granting the relief prayed in the complaint. From such judgment defendants have appealed.

No evidence was adduced in the trial court and accordingly we recite the facts as established by the pleadings. Plaintiff, Springfield Marine Bank, holds title for the plaintiff, Mesa Realty, Inc., to lots one (1) to thirty-two (32) both inclusive, in "Youngston Hills", a subdivision located in Sangamon County Illinois, with the exception of lot twenty-two (22) thereof, which is jointly

owned by the defendants, Robert and Audrey Adams. The lots to which the bank holds title are equitably owned by Mesa Realty, Inc. On May 11, 1960, defendants and plaintiffs entered into a written agreement whereby lot 22 in Youngston Hills Subdivision was purchased by defendants. At the date of said agreement, the development of Youngston Hills had not been fully completed, but provision was made therein for such completion. Said agreement also contained the following provision:

"From time to time upon the request of Seller, either before or after the passage of said title, Buyers agree to join with Seller in the execution, declaration and recording of reasonable protective covenants and restrictions upon said lot and other lots in said subdivision, such covenants being substantially in accordance with the recommendations of the Federal Housing Administration, otherwise their content to be determined in the sole discretion of Seller, and, further, upon such a request, agree to join in the execution, acknowledgment and recording of any plat of subdivision of said Lot 22 and other lands and reasonable easements for utilities upon said Lot 22, as Seller may request. Seller shall pay all costs incurred in the preparation and recording of such covenants, plat and easements."

On July 27, 1960, in accordance with said paragraph 5, plaintiffs, by written declaration, established certain protective covenants covering lots 1 to 32 inclusive of the subdivision. Among other matters included in the covenants, it was provided therein that the minimum cost of a dwelling house constructed on any lot, exclusive of the price of the lot, must be at least \$17,000.00; and that the ground floor area of a one story dwelling must contain not less than 1,250 square feet, and not less than 900 feet in the case of dwellings of more than one story. Some time after the

execution of the protective covenants, plaintiffs were informed by Southway Builders, Inc. that it was interested in developing the remaining lots in Youngston Hills, but that the restrictive covenants prevented the adequate development of the subdivision, as the restrictions contained therein were excessive and unreasonable as to the amount of money required to be spent by a purchaser on a dwelling erected on any of said lots, and were unreasonable in the space requirement for both one story and two story structures to be erected on said lots, and that to adequately develop said Youngston Hills as a subdivision in an economically feasible manner the restrictions should be reduced by a reduction of the minimum cost of a dwelling on any building site from \$17,500.00 to \$13,500.00, and a further reduction of the minimum ground floor area of the main structure of any building so constructed from 1250 square feet to 1050 square feet for any one story dwelling and from 900 square feet to 750 square feet for a dwelling of more than one story.

In accordance with the recommendation of Southway Builders, Inc., plaintiffs drafted a proposed amendment to the protective covenants which provided a reduction in restrictions to a minimum dwelling cost of \$13,500.00, and a minimum ground floor area of 1050 square feet on a one story building, and 750 square feet for a dwelling of more than one story. The proposed amendment was then submitted to the Federal Housing Administration, which approved of same by letter dated April 16, 1962, which recited the following: "We have no objections to this proposed amendment to the covenants

and it is considered acceptable as complying with our minimum requirements." Thereafter, the plaintiffs submitted said amendment to the defendants for their signature in accordance with the provisions of paragraph 5 of the agreement. At the time of such submission, the plaintiff bank advised defendants that the equitable owner of Youngston Hills had been unable to sell any of the remaining lots in the subdivision with the then existing building restriction of \$17,000.00, as contained in the original covenants; that the highest building restriction in that vicinity was \$15,000.00; and that general contractors in the area were of the opinion that Youngston Hills could be developed if the \$17,000.00 restriction was lowered to \$13,500.00. The defendants refused to execute the amendment.

In their complaint, plaintiffs allege substantially the foregoing facts, and pray the court to declare and determine that the amendment to the protective covenants relating to Youngston Hills is reasonable and proper, and within the express provisions of paragraph 5 of their purchase agreement with defendants, and that the provisions of said paragraph 5 require defendants to execute the proposed amendment to protective covenants relating to Youngston Hills. Defendants filed an answer admitting all of the facts alleged in the complaint, denying only that their refusal to sign the amendment was contrary to paragraph 5 of the agreement. At the time of the filing of their answer, defendants also filed a motion for judgment on the pleadings, alleging therein that no issue of fact existed for the reason that the agreement in question

does not require defendants to rescind or reduce by amendment protective covenants once the same have been entered into, and that the amendment which defendants have refused to sign rescinds and reduces the protective covenants previously established. Thereafter plaintiffs filed a motion for judgment on the pleadings on the ground that the admissions contained in the pleadings show as a matter of law that plaintiffs are entitled to the relief as prayed in the complaint. On June 15, 1962, the court heard arguments on both motions and took the matter under advisement. On July 12, 1962, the court sent a memorandum opinion to counsel for both parties advising them of its decision to grant the prayer of the complaint and directing plaintiffs' counsel to prepare an appropriate judgment order. On July 27, 1962, the defendants filed a motion for leave to amend their answer tendering therewith the proposed amendment in which they denied that the amendment to protective covenants as set forth in the complaint is reasonable. The sole ground upon which the motion was based as recited therein is that defendants did not understand certain language of the complaint, i.e. that Southway Builders, Inc. had advised plaintiffs that the covenants previously entered into were excessive and unreasonable to be an allegation that said covenants are in fact excessive and unreasonable, and they therefore initially admitted said allegations. On the same date, plaintiffs filed their motion to strike and objections to the motion for leave to amend. In substance plaintiffs' objections were that on June 15, 1962, when the court heard arguments on the motion for judgment on the pleadings, defendants, although afforded an opportunity to ask leave to

file additional pleadings, did not do so and as a result the court proceeded on the expressed stipulation of the parties that only a question of law was involved; that defendants were not diligent in filing their motion after the court had rendered its opinion deciding the cause in plaintiffs' favor; that the cause had been heard on the pleadings; and that defendants' assertion that they did not correctly interpret all the language in the complaint made after admitting the allegations thereof, is not a sufficient reason for allowing the filing of additional pleadings. On July 27, the court, after a hearing on defendants' motion for leave to amend their answer and plaintiffs' motion to strike the same and their objections thereto, entered an order denying plaintiffs' motion to strike, but sustaining their objections to the motion and further ordered that defendants' motion for leave to amend their answer be denied.

The points upon which defendants base their contention that the judgment of the trial court is erroneous are that paragraph 5 did not require defendants to enter into an amendment which rescinded part of the already established covenants; that the trial court abused its discretion in denying defendants' motion for leave to amend their answer; and that paragraph 5 was amended by a new contract, consisting of the original declaration of covenants and that under such amended contract the restrictions on the property could not be changed or revoked until January 1, 1985, the date specified in the original declaration.

To sustain the first point, defendants in effect assert that paragraph 5 relates only to the requirement that they join with plaintiffs in a single declaration of covenants; that said covenants having once been established, as was done in this case, thereafter no duty rested upon defendants to join in any further or additional covenants which modified any of the previously established covenants or restrictions. Such argument would appear to be effectively refuted by the plain language of the agreement. Paragraph 5 thereof recites that "from time to time upon request of seller either before or after the passage of said title" defendants agree to join in the declaration of "reasonable protective covenants and restrictions", and that the content thereof is to be "determined in the sole discretion of seller". This language cannot be said to be ambiguous. It indicates no intention to restrict plaintiffs' right to establish covenants or restrictions to any particular declaration or any particular time, and determination of the content of such covenants was vested solely in plaintiffs. It if was intended to express an agreement differing from the written contract, language to that effect was omitted, and the trial court was powerless to supply same. It is to be presumed that the parties incorporated in the written agreement all matters involved in the transaction then at hand. Armstrong Paint Works v Continental Can Company, 301 Ill. 102. We find no language in this contract which justifies the conclusion that paragraph 5 refers only to the covenants and restrictions originally established. The recital in paragraph 5 that "from time to time upon the request of seller" the defendants

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agree to join with plaintiffs in the declaration of protective covenants renders it apparent that the parties understood the circumstances under which plaintiffs' right to call upon defendants to join in such a declaration might be exercised was an indefinite factor. Hence, the use of the words "from time to time". If we were to adopt defendants' theory that a declaration once made exhausted the plaintiffs' authority with respect to covenants and restrictions, we would in effect be re-writing paragraph 5. This we are not permitted to do. Where there is no ambiguity in the language of the contract the meaning must be determined from the words used. Englestein v Mintz 345 Ill. 48.

Defendants complain of the trial court's action in refusing to permit the filing of an amendment to their answer. The record shows that when the defendants filed their motion for leave to amend the answer, the trial court had already decided the case as indicated by its memorandum opinion. Nothing further remained to be done except entering the order which plaintiff had been directed to prepare. It was not until July 27, 1962, which was the date of the entry of the judgment order that the defendants' motion to amend their answer made its first appearance. The reason for such tardiness is unexplained. The only excuse offered was defendants' assertion that they admitted the allegations of the complaint because they were unaware of the construction the trial court would place upon a portion thereof. Apparently defendants were satisfied with the answer on file until they learned that the case had been decided

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1. The first of the series is the concrete pier, which is to be placed in the river.

adversely to their theory. If defendants' motion had been allowed, it would have resulted in raising an issue of fact as to whether the proposed reduction as to the construction limits in the subdivision were reasonable. Prior to filing their motion for leave to amend, the defendants had not suggested by their pleadings any conviction that there was an issue of fact involved in the case. They had however affirmatively conceded that no such question existed. The rule is that where the pleadings are complete in form and all parties have moved for judgment on the pleadings they thereby concede that no fact question exists and that the issues presented to the court are solely questions of law. 26 C. J. S., Declaratory Judgments, Sec. 145. The trial court has broad discretion with respect to the allowance of amendments to pleadings and refusal to allow an amendment is not prejudicial error unless there has been a manifest abuse of such discretion. Lowrey v Malkowski 20 Ill. 2d 280, 170 NE 2d 147, Lundberg v Gage 22 Ill. 2d 249, 174 NE 2d 845. Here the trial court committed no abuse of discretion in denying defendants' leave to amend their answer.

Finally, defendants contend that the original declaration of covenants constituted an amendment to paragraph 5 of the contract, and since it was provided in such declaration that the covenants were to run with the land until 1985, the parties were powerless to thereafter amend the same. We think this a rather tenuous argument. The contract under which plaintiffs seek a declaration of rights is the purchase agreement. Thereunder defendants obligated

themselves when requested by plaintiffs to join in the declaration of reasonable covenants and restrictions. Whether the defendants joined in the original declaration is immaterial. The proposed amendment was a declaration of covenants and restrictions, and so far as this action is concerned, represents the only covenants in which defendants were requested to join. The only contract with which we are concerned is the purchase agreement. The effect of adopting defendants' theory would be to hold that regardless of changing conditions or circumstances, plaintiffs could not call upon the defendants to join with them in modifying the existing covenants. Apparently to prevent such happening, paragraph 5 specifically stated that the plaintiffs might request defendants to join in establishing reasonable covenants and restrictions from time to time. If as defendants now contend paragraph 5 of the purchase agreement was replaced by the declaration of covenants which plaintiffs seek to amend, such theory should have been advanced in the trial court. Were there facts which if proven would establish that defendants had been relieved of any obligation under paragraph 5 the same are matters outside the pleadings and could not be considered either in the trial court or upon this review.

For the reasons indicated we are of the opinion that the trial court correctly resolved the questions of law presented by the pleadings and accordingly its judgment is affirmed.

Affirmed

REYNOLDS, P.J., and ROETH, J., concur.



STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

41 IAR 317

General No. 10415

Agenda No. 1

John C. Leonard,)	
)	
Plaintiff, Counterdefendant-)	
Appellee,	)	Appeal from the
	)	Circuit Court of
vs.	)	McLean County.
)	
Frances G. Jacobs,)	
)	
Defendant, Counterplaintiff-)	
Appellant.)	

ROETH, Justice.

This suit was brought by John C. Leonard against Frances G. Jacobs for injuries sustained by him in an automobile collision that occurred on October 13, 1960, when the automobiles of plaintiff and defendant collided at an intersection of two blacktop roads in a rural section of McLean County. Plaintiff was traveling North on a road guarded by a stop sign from traffic coming from the East, the direction in which the defendant was traveling.

The case was tried on the complaint and counterclaim, each of the parties charging the other with negligence and with an additional count by the defendant charging the plaintiff with wilful

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plaintiff

and wanton misconduct. At the conclusion of defendant's case on motion by plaintiff the court struck the wilful and wanton count of the counterclaim. The jury having considered the matter on the cross charges of negligence found in favor of plaintiff and returned a verdict in the sum of \$20,000.00. Defendant brings this appeal contending that the trial court erred (1) in allowing defendant's motion to dismiss the wilful and wanton count of the counterclaim, (2) in admitting certain evidence and exhibits in evidence, (3) in the giving of plaintiff's instruction No. 11. It is finally contended that the verdict was excessive and a remittitur should be ordered.

The facts are simple. The only eyewitnesses to the accident were plaintiff and defendant and their testimony regarding the occurrence is in complete conflict. Plaintiff, a 39 year old man, married, with four children, is the operator of a grain elevator, of which he is part owner. On the evening in question at about 7:30 P.M. he was driving on a blacktop road known as the Leroy Blacktop headed in a Northerly direction. It was a very dark night, the pavement was dry and weather clear. According to plaintiff's testimony the Leroy Road and the surrounding terrain is flat. The road itself is approximately 20 feet in width and intersected a road slightly narrower. There was no stop sign on the road

he was traveling as it intersected the East-West road. He was traveling at a rate of 50 to 55 miles an hour, his headlights were working and on and his car in excellent shape. As he approached the intersection he noted the headlights of defendant's car on the right and driving on the intersecting road, headed in a Westerly direction. He was able to see the defendant's headlights through the corn growing in the field in the Southeast quadrant of the intersection. He estimates that he was approximately 40 yards from the intersection when he observed the other car which was approximately the same distance from the intersection. He continued to watch it "for a second" and when he realized the other car was not going to stop he slammed on his brakes and hit the horn. He testified "my car did not, could not stop and her car seemed to accelerate...". He estimated the speed of the other automobile at approximately 50 to 55 miles per hour, the same speed at which he was traveling, and that defendant drove her car into the intersection without stopping for the stop sign. The cars collided in the intersection. After the accident he shut off the motor of his automobile and got out and shortly thereafter stood in front of his car in front of the headlight "that was burning" to hail a passing motorist. He was shortly thereafter taken to a hospital in an ambulance in which the defendant was riding as a passenger. On the trip to the hospital he stated that he heard the defendant crying and heard her say to

another passenger in the ambulance, "What did I do? Did I run a stop sign?"

The only obstruction to vision was a corn field in the Southeast quadrant of the intersection and testimony is that the corn was approximately 6 feet tall, or at maximum height. Plaintiff testified that he was approximately 25 yards from the intersection when he hit the brakes and sounded the horn.

A witness for plaintiff testified he was in the ambulance with plaintiff and defendant and heard the defendant ask if she had run a stop sign. This witness stated that when he arrived on the scene after the collision the headlights on the defendant's car were burning, "but I am sure that the headlights on Mr. Leonard's car were out". He observed the skid marks and marks of the impact the next morning. The skid marks appeared in the middle of the intersection running to where the cars stopped and he also noted other skid marks coming from the South. These were solid for a distance and then appeared intermittently. They came from the right side of the road and angled to the center. After the accident the defendant's car was facing Northeast with its rear end against the corner of the fence on the Northwest corner of the intersection. Plaintiff's automobile was backed up against the front end of defendant's automobile, facing North and resting a little to the East of it.

A Deputy Sheriff called by plaintiff testified that he examined

the area of the accident and observed and measured the skid marks by stepping them off, that the skid marks in the right lane of traffic measured 27 steps, approximately 3 feet per step. It would appear from the record that these skid marks were made prior to the impact. He confirmed the fact that there was a stop sign for the East-West road that defendant was traveling and none on the North-South road plaintiff traveled. He had no recollection if the lights were ^{on}/either of the automobiles involved when he arrived on the scene.

Defendant, called under Section 60, testified that she lived approximately 8 or 9 miles from the intersection, that on the evening in question she had a bridge date with girl friends and left her home about 7:25 P.M. She had driven the road quite frequently and was well acquainted with it and familiar with the stop sign at the intersection. It was dark when she approached the intersection and the pavement dry and "visibility clear". The field lying in the Southeast quadrant of the intersection contained corn at its maximum height and there were no curves in the road she was traveling in the close proximity of the intersection where the collision took place. She was traveling 50 to 55 miles per hour. As she approached the intersection she slowed down and ultimately came to a stop beyond or West of the stop sign. After completely

stopping she looked to the left and then to the right as far as she could see and does not recall looking again to the left or to the South. She testified that she "did not see anything". She then started across the road. Her testimony is that she at no time saw the defendant and could not say what speed he traveled and further stated, "I do not know whether he had his lights on or not". She does not know the action plaintiff's car took before the impact and does not know whether or not he applied his brakes or sounded his horn. She further testified that she has no recollection about the accident. She did not recall the ride to the hospital nor making the statement attributed to her. She identified plaintiff's photograph, Exhibit 14, subject to the qualification "that there is a difference in the growing crop on the intersection", indicating that the photograph does not show growing corn and that at the time of the accident the corn was higher than her eye level as she sat in the car, that it was at maximum height. She stated that her line of vision was not the same as shown in the photograph in question. Defendant moved that the photograph, Plaintiff's Exhibit 14, be stricken from the record, which motion the court denied.

On behalf of defendant two witnesses testified they came upon the scene a short time after the accident. Neither was certain as to the elapse of time from the accident to their arrival, but

accounting and looked to the left and then to the right and

she could see only the wall of the building and the

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other people who were standing

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at the time they arrived the lights on defendant's car were burning and that the lights on plaintiff's car were out. Defendant's husband testified, when he arrived at the scene approximately 45 minutes after the accident, the lights on both cars were out. He further testified that the automobile defendant was driving was in good condition and the driver's vision from the car unobstructed.

From an examination of the exhibits and testimony of the parties it appears that the impact took place between the right front end of plaintiff's automobile and the right side just behind the driver's seat and at the rear door of defendant's automobile. The photographs indicate that the headlights on defendant's car were undamaged but it can not be ascertained from the exhibits or testimony as to the condition of the headlights on plaintiff's automobile, although the photograph does show damage to the right front fender.

The first witness on the scene stated he observed that the right headlight on plaintiff's automobile was burning but did not recall if the lights on defendant's automobile were on or not. Because of the damage to plaintiff's right front fender, defendant asks us to imply that this witness was mistaken and in fact the light he saw was on defendant's automobile. No other proof was offered on this point.

The testimony is without conflict except on the one major point and that is whether or not defendant stopped for the stop sign before

proceeding across the Leroy Road. If we adopt defendant's view there is a conflict regarding one other major point and that is whether the lights on plaintiff's automobile were burning as he approached the intersection. Plaintiff testified that he did have the lights on at the time and one witness testified he saw one light on plaintiff's vehicle when he arrived. The defendant does not know whether or not plaintiff had his lights on but simply states that as she approached the intersection she looked to the South and did not see plaintiff. Defendant infers from that that she did not see him because his lights were not on and backs this up with testimony of witnesses who arrived after the accident.

From the foregoing analysis of the testimony it should be apparent that the questions of negligence and due care of the respective litigants presented fact questions for the jury to decide. The jury determined that defendant was negligent and plaintiff was exercising due care and was free of contributory negligence. Accordingly it found for the plaintiff on his complaint and against the defendant on her counterclaim and we cannot say that such findings were not warranted by the evidence. Having so found, the jury could not have found plaintiff guilty of wilful and wanton misconduct as alleged in the count of the counterclaim which the court struck from the case. This assignment of error has no merit

unless there are other errors which would require a new trial.

The defendant next contends the Court erred in admitting in evidence Plaintiff's Exhibit 14. As we have noted, it consists of a photograph of the scene where the accident took place. At the time of the accident the field in the Southeast quadrant of the intersection was filled with fully grown corn. Defendant's objection to the exhibit is that it does not depict the growing corn in the Southeast quadrant of the intersection. The record adequately shows that the jury was fully advised of this situation and it was admitted with that qualification. We fail to see how defendant can claim error in this regard since it was her theory throughout the trial that she stopped her car at a point beyond which the growing corn could have obstructed her view. On the other hand, plaintiff makes no particular point as to the growing corn since he testified he could see the headlights of defendant's car approaching the intersection in spite of the corn. The lack of corn in the photograph could hardly have influenced the jury and we are of the opinion that no error was committed in admitting the photograph.

Defendant's next objection is to the admission of the harness traction device and cervical collar worn by the plaintiff and the use of a plastic model of the cervical vertebrae by one of plaintiff's doctors and the sensory examination made of plaintiff by the doctor in the presence of the jury. Defendant cites Smith v. Ohio Oil

Company, 10 Ill. App. 2d 67, 134 N.E. 2d 526. In that case the medical witness was permitted to use a plastic model of a human skeleton to assist the explanations. The court said:

"The use of physical objects before a jury falls into two categories: 1, real evidence, which Wigmore calls 'autoptive,' and 2, demonstrative evidence. The tests for the proper use of either are substantially similar, i.e., the object must be relevant to some issue in the case, and it must also be actually explanatory of something which it is important for the jury to understand. If these tests are met, the courts do not seem to be greatly concerned with the question whether the object is gruesome.

"Real evidence involves the production of some object which had a direct part in the incident, and includes the exhibition of injured parts of the body.

"Demonstrative evidence (a model, map, photograph, X-ray, etc.) is distinguished from real evidence in that it has no probative value in itself, but serves merely as a visual aid to the jury in comprehending the verbal testimony of a witness. Wigmore, Evid. Sec. 790, et seq. It is said its great value lies in the human factor of understanding better what is seen than what is heard. Wigmore favors the use of any aid modern science may provide, to the end that the jury may have the best possible understanding of matters it must decide. The limitations are: that the evidence must be relevant and the use of the object actually explanatory. Sometimes the question of accuracy of an exhibit is pertinent, but this seems to be a phase of its explanatory function, since it may be misleading if inaccurate.

"As a result, the use of such evidence is usually left to the discretion of the trial court, and expressions of disapproval are generally based on irrelevance, or that the model, picture, etc., was misleading or not explanatory. Therefore, this court will not announce any flat rule that a skeletal model may never be used, but holds

that its use must be actually explanatory of some relevant issue in the case.

"This court holds that the determination of relevancy and explanatory value of demonstrative evidence is primarily within the discretion of the trial court, but, to curtail abuses, is subject to review as to the actual use made of the object. If it appears that the exhibit was used for dramatic effect, or emotional appeal, rather than factual explanation useful to the reasoning of the jury, this should be regarded as reversible error, not because of abuse of discretion, but because actual use proved to be an abuse of the ruling."

Plaintiff called as his witnesses three doctors and inasmuch as defendant has not only raised the issue of the propriety of using plastic models and other demonstrative evidence but also the further issue that the verdict was excessive, we deem it advisable that the testimony of the doctors be set out in detail. The family physician testified that he examined plaintiff the day following the accident and noted acute swelling in the area of the head, scalp, and discoloration over the left parietal area. Plaintiff's neck showed considerable muscle spasm over the entire nuchal area and the doctor found acute pain and tenderness on palpation over the spinous processes of the second cervical vertebra. He also noticed some tenderness over the lumbar spine. He saw plaintiff regularly in the hospital and the treatment instituted was bed rest and traction of the cervical spine. He stated that he had seen and treated plaintiff before the accident and his

condition prior to the accident was good. When he again examined the plaintiff on November 5 and February 15 of the following year, plaintiff complained of pain and hurting in the neck and left arm. He found some tenderness of the neck at the nuchal area and testified as to limitation on movement of the neck and that the injury plaintiff sustained was permanent. He testified that the muscle spasms persisted and that the same would cause fibrous shortening. There was no objective evidence of the injury in the neck or the lumbar spine but that he thought that plaintiff sustained a whiplash injury and is presently suffering from the residual of that injury.

Two orthopedic surgeons testified in behalf of the plaintiff. Their treatment consisted of the use of the harness traction device, the cervical collar and pain reliever. They both testified as to loss of movement of plaintiff's head, one stating that at an early examination plaintiff was only able to move his head a few degrees to the left and about one-third normal to the right. They found tenderness in the neck and muscle spasms on the left side of the neck. A sensory examination was made of the plaintiff and they found that the fourth and fifth fingers of the left hand were numb and there was a narrow band of decreased sensation running from the back of the left arm from the neck to the two fingers on the left hand. The difficulties plaintiff had with his back subsided

but the difficulty with his neck and arm has persisted throughout. Muscle spasms were indicated and the sensory loss in the arm noted throughout the latest examinations just before trial. The doctors each testified as to other objective symptoms of the plaintiff as indicative of the neck involvement. A three-fourths inch difference in measurement of the left arm as compared with the right above the elbow and 1 inch below the elbow was noted and later examinations disclose that the variance between the two extremities became greater as the left arm became smaller. One of the doctors testified that the plaintiff at a later examination was only able to move his neck 50% to the right very slowly and with a lot of effort, and about 25% of normal to the left. It was the impression of both doctors that the injury was severe and permanent. One doctor stated that plaintiff might have had a ruptured disc which was impinging on a nerve root.

One of the orthopedic surgeons for the plaintiff then proceeded to describe the cervical area of the spine, including the nerve structure and movement of the same. He went on to explain to the jury the areas affected by the nerves in the spine and over the objection of the defendant was permitted to conduct a demonstration on plaintiff. He testified that on the day of the trial he made tests upon the plaintiff in the areas of decreased sensation of the

upper right and left extremities of the plaintiff by scratching on the arm. The test demonstrated that the ulnar nerve is somewhat interrupted in its function and he demonstrated this test before the jury. That in plaintiff's case the decreased sensations in the arm and hand correspond with the injury to that portion of the neck examined. He stated that a rupture of the disc in the area could cause the condition found in the plaintiff. He stated, however, that there was no objective evidence of a ruptured disc. That the findings could not be made in all cases by x-ray. He stated that the pain and limitation of movement and sensory changes of the left arm in his opinion were permanent and suggested that surgical intervention was a possible solution to plaintiff's problem. He testified that plaintiff needed further treatment and that pain could become worse and require such surgical intervention, but that in any event there was no foolproof method of curing plaintiff of his ills.

The other orthopedic surgeon testified that he found a 1/2 inch atrophy of the left thigh and noted a weakness in the gripping of plaintiff's left hand and affirmatively stated that plaintiff had a power loss in the left arm. He found a motor power weakness in the left quadriceps muscles and found plaintiff unable to extend his knee with a 5 pound weight as compared to normal lifting with the right leg. He found approximately a 90% loss of

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active motion of the neck in all directions and an 80% loss of passive motion in all directions. He stated that as a rule nerve functions return after a period of 180 to 200 days and that this did not occur in plaintiff's case. The doctor then produced a plastic model representing the base of the skull with the 7 cervical vertebrae. The model was in various colored plastics representing the different areas of the vertebrae. He then proceeded to explain that the section of the model of interest, that is the ulnar nerves, come from portions of the last 4 vertebrae and indicated their position and the manner in which they leave the vertebrae. He indicated the discs and described their functions, explaining that they are not discernible on x-rays and followed with a discourse with relation to what on the model would appear on x-ray film, all the while pointing to the model to describe his testimony. He stated that in his opinion the condition of plaintiff's neck was permanent and he described it as a robot position.

Defendant called an orthopedic surgeon who had examined the plaintiff, first, at plaintiff's request shortly after the accident and, secondly, at request of the defendant. His findings were that while plaintiff was not a malingerer, that plaintiff's injuries were temporary. He stated that if he knew as late as September 18, 1961, of the atrophy in plaintiff's arm and the loss of sensation

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in the arm and hand and he knew that the condition of plaintiff's neck had not improved and was in fact worse, that he would have to make allowances for this in his opinion and evaluation of plaintiff's injuries.

Plaintiff testified that immediately after the accident his arms were skinned, his head immediately started to swell and his right leg was hurting a little bit. That he had a big knot on the right side of his neck and head and his neck and shoulders commenced hurting. He was confined to the hospital 15 days and after x-rays was placed in traction and ice packs applied to his person. He testified as to the pain and of being in traction for 7 or 8 days. He explained the mechanics of traction both at the hospital and at home. He testified that he was fitted with a Thomas collar at the hospital and to wearing it after leaving the hospital. He stated that he did use the tractional device for at least three months after his discharge from the hospital and that he still wears the collar when he can not stand the pain. The last time he wore the collar was on the Saturday previous to the trial. He stated he was in good physical condition prior to the accident and had no difficulty with his arms or legs. He described the pain in his neck, arms and fingers, in his ankle and on the ball of the foot of his left leg. Prior to the accident he was not limited in his physical activity and that he was required to and did heavy work.

At the present time his activities are limited insofar as physical dexterity is concerned. He is prevented from doing anything physical because of the pain. He stated that he is very nervous at the present time, particularly when driving an automobile and when he attempts to turn his head in either direction it causes great pain. He testified to his inability to play with his children and to suffering considerable headaches immediately after the accident. Plaintiff's wife testified as to his health and energy prior to the accident and the personality change since. He testified that he returned to work on a part time basis about 5 or 6 weeks after the accident and returned on a full time basis about 3 months thereafter. That he is a manager of the elevator, part owner of the company, and receiving the same compensation he received prior to the accident. That he suffered no wage loss. The record discloses that plaintiff's medical expenses were \$821.87.

Defendant complains of the use of the plastic model by one of plaintiff's doctors and the introduction of the cervical collar and traction harness into the evidence. As we have previously stated, the use of these items is within the trial court's discretion. It is necessary, therefore, that we examine the evidence to determine the actual use made of these items in determining whether the court erred in allowing plaintiff to use the exhibits.

Defendant can not complain that a description by the plaintiff

or one of his doctors of the collar and harness would not be admissible testimony and for this reason we can not give merit to her claim that the mere display of these items themselves would be prejudicial. So far as we are able to ascertain, these items were placed into evidence and identified as the items used by plaintiff and described by him in his treatment. In short, while they may have had "no probative value" they must be said to have been used merely "as a visual aid in comprehending the verbal testimony of a witness". It does not appear that the objects were used for dramatic effect or emotional appeal and we therefore hold that there was no error committed in allowing the collar and harness into the evidence.

The court is also of the opinion that there was no error committed in permitting plaintiff's doctors to use the plastic model. The testimony was that the doctor indicated on the model the location of the nerve involved and discussed other matters before the jury describing such things as the vertebrae, discs, and nerve distribution. We perceive that it is extremely difficult for persons not acquainted with anatomy to obtain a visual picture from testimony concerning the spine. Here there was an alleged neck involvement. Testimony on direct and cross went to the possible fracture of vertebrae, disc involvement and the delicacy of surgery

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in the area and a myriad of technical terms. It would appear that the use of the model helped explain a highly complex problem. The use of the model was restricted by the lower court for the purpose of showing the origin of the ulnar nerve. It is also noted that defendant's objection to the use of the model was based on no sufficient foundation and during the course of its use during the trial defendant's only objection was on the basis that a particular question was leading. Defendant has not pursued her objection to the lack of proper foundation. It appears from the record that the model's use was slight and served as a visual aid to the jury in comprehending the verbal testimony. We are unable to see where it was put to any use that was either calculated to or which might mislead the jury, nor can we see where it was used for dramatic effect and emotional appeal only. We therefore conclude that the lower court did not err in permitting the use of the plastic model.

Defendant next contends that the court erred in giving certain instructions relating to damages. The record fails to show, however, that defendant raised the question on post trial motion, therefore it can not be raised for the first time on appeal. It is not sufficient that she may have objected to the giving of the same during the conference on instructions, but if error were committed it is necessary that it be raised and the lower court afforded an

opportunity to correct its error, if any, by a post trial motion.

Ryan v. Monson, 33 Ill. App. 2d 406, 179 N.E. 2d 449. In any event we do not feel the instruction erroneous. It was extracted verbatim from Illinois Pattern Instructions and was applicable to the case at bar.

The final contention of the defendant is that the verdict of the jury was excessive. In Ford v. Friel, 330 Ill. App. 136, 70 N.E. 2d 626, the court said:

"This court has been called upon many times to determine whether a verdict under a given state of facts was excessive. The decline in the purchasing power of money has frequently been considered in determining the question. . . The question of damages is peculiarly one of fact for the jury, and where the jury has been correctly instructed upon the measure of damage, and it is not claimed nor shown that the size of the verdict clearly indicates it was the result of prejudice or passion on the part of the jury, the award should not be disturbed upon review. . .

"In no case will the scales of justice balance, when injuries, pain and suffering are placed upon the one side and monetary compensation upon the other. . . ."

In Smith v. Illinois Cent. R. Co., 343 Ill. App. at page 612, 99 N.E. 2d at page 726, the court said:

"The question of damages to be assessed in this kind of a case is one of fact for the jury. . . There is nothing in the record which would justify a conclusion that the jury's finding of damages was against the manifest weight of the evidence.

"We are asked to find that the assessment was excessive. We need not cite authority for the statement that we must consider the fact that this verdict reflects

an inflationary period in our economy. The question of excessiveness is not to be determined by what we as judges think the damages should have been. The question is whether reasonable men might differ in their answers to the question. . . . Because we think reasonable men might differ on this question, we cannot say that the jury was moved by passion."

The evidence in this case tended to prove considerable pain and suffering and reasonable expectation that such pain and suffering would persist in the future unless risky surgical intervention was attempted and the possibility of successful surgery was not very good. While it is true that the pain and suffering might well abate and freedom of movement return, yet the evidence was at best conflicting on this subject. It was for the jury to determine from the evidence produced by both sides whether this injury was permanent or of a temporary nature.

Defendant complains that plaintiff sustained no loss of wages in her argument that the verdict is excessive. Matters of this nature should not as a matter of law be held against the plaintiff. There is not necessarily a correlation between pain and suffering and severe injury on the one hand and loss of wages on the other. As a part of the proof of the extent of injuries it is not mandatory that a claimant sustain a wage loss. If this were true, those who were less fortunately employed could not expect the same justice available to others. The return of plaintiff to his employment approximately 5 weeks after the accident on a part time basis and

to full time employment 3 months after the accident may be a credit to his tenacity and devotion to duty, rather than a sign of freedom from pain and suffering. In any event it was an element that the jury was entitled to consider and we can conclude only that they did take it into consideration.

What the court may feel in this instance regarding the size of the verdict is no matter. We find nothing in the record, and this includes the size of the verdict, that indicates the same was predicated upon prejudice or passion. A perusal of the instructions discloses they were correct and no error committed in giving the same.

For the reasons set forth herein the judgment of the Circuit Court of McLean County will be affirmed.

Affirmed.

REYNOLDS, P.J. and CARROLL, J., concur.

Abstract

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Gen. No. 11649

Agenda 1

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, A. D. 1963

LERoy DANDURAND,
Plaintiff-Appellee,

vs.

ELLSWORTH LONG,
Defendant-Appellant,

EDWARD SCHNELL, d/b/a
SCHNELL'S DAIRY,
Plaintiff-Appellee,

vs.

ELLSWORTH LONG,
Defendant-Appellant.

Appeal from the
Kankakee County Circuit
Court, No. 33208.

CONSOLIDATED CASES.

Appeal from the
Kankakee County Circuit
Court, No. 32677.

CROW, J.

This is an appeal by the defendant, Ellsworth Long, from judgments in favor of Leroy Dandurand and Edward Schnell, plaintiffs, for \$7750.00 and \$1711.04, respectively, in these consolidated cases in the Circuit Court of Kankakee County, growing out of an automobile collision. The complaint of Dandurand alleges personal injuries and the complaint of Schnell alleges property damages. The verdicts of the jury were for the plaintiffs. The defendant's post trial motion for judgment notwithstanding the verdict, or for new trial was denied. No questions are raised on the pleadings. The defendant claims the Trial Court committed reversible error in the following respects: (1) gave over the defendant's objection, the plaintiffs' instructions 14, 15, and 17; and (2) failed to give the defendant's instructions 12 and 13. The plaintiffs urge that the jury was properly instructed and there was no error in giving or refusing the foregoing instructions.

The complaint of each plaintiff is substantially the same so far as material, except that of Dandurand is for personal injuries, and that of Schnell is for property damages to his truck and its contents. The complaint of Dandurand alleges that: on June 13, 1958 about 7:30 a.m. he was the driver of a 1955 Ford truck with a milk truck body, delivering dairy products to customers in Kankakee County, as an employee of Edward Schnell, d/b/a Schnell's Dairy, owner of the truck. The plaintiff, proceeding westerly on a gravel road, stopped at the intersection of that road and U. S. Route No. 45, a two-lane concrete highway running in a north and south direction and intersecting the gravel road at right angles, and, after stopping at the east side of that intersection, he proceeded westerly across U. S. 45 with headlights lighted, and the truck was struck by the vehicle driven by the defendant. On that date the defendant was possessed of a Chrysler automobile which he was driving in a southerly direction on U. S. 45 approaching the foregoing intersection. A storm was approaching and it was unusually dark and necessary for motor vehicles upon the highways to have headlights lighted, and the defendant did not have headlights burning upon his vehicle. It became the duty of the defendant to operate his automobile with ordinary care and diligence and to have due regard for the rights and safety of all persons and property rightfully on the highway including the plaintiff and the truck operated by him. The plaintiff was in the exercise of due care and caution for his own safety and the safety of his motor vehicle. The defendant disregarded his duty, negligently ran into the rear end of the plaintiff's motor truck as it proceeded westerly across the intersection, and the motor vehicle of the defendant struck the plaintiff's truck with such force and violence it turned the truck over, thereby seriously and permanently injuring the plaintiff. The defendant was guilty of one or more of the following negligent acts or omissions: (a) operated his vehicle at a speed greater than reasonable and proper having regard to traffic conditions and the use of the highway,

so as to endanger the person of the plaintiff, in violation of Section 49 of the U. A. R. T. of Illinois; (b) operated his vehicle without brakes adequate to control the movement of and to stop and hold the vehicle, in violation of Section 114 of the U. A. R. T. of Illinois; (c) failed to keep his vehicle under proper or sufficient control; (d) failed to keep a good and proper look-out for vehicles lawfully crossing the highway; (e) failed to stop his vehicle before it collided with the plaintiff's truck even though the truck being operated by the plaintiff had proceeded almost completely through the intersection; (f) failed to yield the right-of-way to the plaintiff's truck even though his truck had entered the intersection and had passed through the greater part of the intersection before the vehicle of the defendant had entered the intersection, contrary to section 68 of the U. A. R. T. of Illinois; (g) failed to light the headlights upon his vehicle so as to make his vehicle visible to other drivers on the highway at a time when it was unusually dark and hazardous to operate his vehicle without headlights; (h) failed to do anything in the operation of his vehicle to avoid collision with the truck operated by the plaintiff when danger of a collision was imminent and known to the defendant. As a direct and proximate result, the defendant's vehicle collided with the rear of the truck operated by Dandurand, caused it to upset, and damaged the truck and its contents and injured the plaintiff Dandurand.

The answer of the defendant admits that on June 13, 1958, the plaintiff Dandurand was the driver of a 1955 Ford truck equipped with a milk truck body, as an employee of Edward Schnell, d/b/a Schnell's Dairy, owner of the truck. It denies that the truck being operated by the plaintiff stopped at the intersection of the foregoing road and U. S. 45, and that the truck had headlights lighted when it was struck by the defendant. It admits that on June 13, 1958, at about 7:30 a.m., the defendant was possessed of a Chrysler automobile which he was then driving south on U. S. 45 approaching the fore-

going intersection, but denies that it was unusually dark or visibility was unusually limited and denies that it was necessary for motor vehicles to have headlights lighted. It denies that the plaintiff was rightfully upon the highway. It denies that the plaintiff was in the exercise of due care and caution for his own safety and the safety of his motor vehicle. It denies that the defendant negligently ran into the rear end of the plaintiff's truck, seriously and permanently injuring the plaintiff. It denies that the defendant was guilty of any negligent acts or omissions and denies that the defendant was guilty of any of the negligent acts or omissions alleged in paragraphs 8a through 8h of the complaint. It denies that as a direct and proximate result of one or more of those acts of negligence or omissions the plaintiff Schnell's truck was damaged, its contents were destroyed, or the person of the plaintiff Dandurand was injured. It denies the injuries of the plaintiff alleged in the complaint and denies that any of the injuries in fact existing were proximately caused by any act of negligence or omission of the defendant.

The only witnesses present at the time of the collision were the plaintiff Dandurand and the defendant Long and the defendant's wife, Lillian, who was a passenger in his car at the time.

The plaintiff Dandurand testified that he had been driving a milk truck in the rural area around Manteno for the plaintiff, Schnell, for 7 to 10 years prior to the accident. On the morning of the accident he had started at 2:30 a.m., and a little before 7:30 a.m. he made a delivery at the Milton Knoop farmhouse, 350 to 400 feet east of the intersection where the accident occurred. From the Knoop house he proceeded west on the gravel road toward Route 45, with his headlights on low beam and at a rate of 7 to 8 miles per hour -- not over 10 miles per hour. As he observed the conditions of visibility, "it was very dark - just like 10 o'clock at night" and you could not see an unlighted object more than 8 or 10 feet at most. He had, he said, just put his windshield wipers on. His

visibility through the window parts of the doors of the truck was clear. He did observe that there was a storm approaching from the southwest. He said he stopped at the "STOP" sign for Route 45 which was 7 to 9 feet from the pavement of Route 45 and looked in both directions, seeing no traffic from the south, and seeing some headlights from the north. Those headlights from the north he judged to be "high headlights" at the Mallaney Creek bridge about a quarter of a mile away (actually one-half mile) and they turned out to be those of the Victory bus which he usually saw at that time in that area and which usually was the only traffic at that time. He could tell the lights were "high" from "the variation of how they set on the vehicle coming." However, he could see no vehicle coming from the north on Route 45 ahead of the bus and saw no headlights ahead of the bus. He saw the stop sign as he came up to Route 45 when about 20 feet away and had his lights been in the up position he could have seen it but little farther. Although he had stated earlier that it was foggy, he later said that it wasn't foggy but just a misty rain and the only impediment to his vision was the darkness. His approach to the stop sign had been very slow and he could have stopped almost instantly. As Dandurand drove across Route 45, he got all the way across the pavement except the rear 17-18 inches of the truck he was driving was struck by the automobile driven by the defendant Long, whose automobile he was not sure he had seen before this impact. The Long car had no lights on. The truck was turned over. He was thrown threw the windshield. He went to the Long car afterwards. It was sitting on the highway where the impact was. Several persons were at the scene shortly afterwards. He had no conversation with Mr. or Mrs. Long. All the vehicles he'd met that morning had lights on except the Long car. It rained hard shortly afterwards. The truck weighed 7660 pounds empty and there was 2 to 3 tons of milk contents. In a conversation afterwards with the State Police Officer who had arrived, Long said he had not had his lights on, and Long said Dandurand had stopped at the intersection and did have his headlights on. He turned off the truck headlights a good half-hour after the accident. Several

witnesses, in varying respects and degrees, supported the plaintiff Dandurand's version of the circumstances existing at or shortly after the time of the accident.

The defendant Long testified that the weather was sun shiny and cloudy intermittently. Visibility was good. He was driving 45-50 m.p.h. He noticed no storm coming up before the accident. He did not have his lights on. Another car passing him had no lights on. After he passed the Malleny Creek Bridge he noticed the plaintiffs' vehicle coming from the left or east, moving west. The plaintiffs' truck was about 300 feet east of the intersection when Long claims to have first seen it and Long was about 700 feet from the intersection at that time. He continued to observe the truck. Long says that the plaintiffs' truck was driven along in a normal manner and as the truck approached the stop sign it slowed down. Long first said that the truck did not come to a complete stop but on cross-examination admitted that the truck started slowing up 100-150 feet away from the stop sign, and that it slowed down to probably 2 miles per hour. The defendant also said "It might have been possible for him to actually stop for an instant and then proceed." At the time the plaintiffs' truck reduced to its slowest speed it was completely off the highway to the east and the defendant was proceeding south on Route 45 about 45 m.p.h. about 50 feet (he said) from the intersection. Long further said that at 45-50 m.p.h. on dry pavement he could stop his car in 100-150 feet. The defendant didn't know whether he slid the wheels of his car by braking or not but stated he did not turn the wheel of his car in either direction from that moment. He put his foot on the brake. He blew the horn. The brakes were in good working order. Police Officer Just was unable to detect any skid marks on the pavement from the defendant's car. The defendant was likewise supported, in varying respects and degrees, by the testimony of several witnesses in his behalf as to the circumstances at the time of the accident, or shortly thereafter. Long said the concrete on Route 45 was 18'-20' wide, there was an additional 20' from the east side of the pavement to the east line of the highway, and the

STOP sign was further east of the east line of the highway. He would not say the plaintiff's headlights were not lighted as he approached the intersection. At the point of impact he was in the right hand (west) lane of Route 45, just about on the intersection or ready to go through it. His car struck the truck toward the back end. He says Dandurand afterwards said he could not see, the windows were steamed up. Some passers-by were present afterwards.

The only additional matters that may be noted in the testimony of Lillian Long, the defendant's wife, the only other witness present at the time, are: She said it was not real light, but it was not dark. Dandurand did not stop at the intersection. The sun was not real bright. She saw no vehicles on Route 45 which had headlights on. Dandurand slowed to 5-10 m.p.h. or less at the intersection. It was not dark, and it was not the brightest day either.

The defendant's refused Instructions 12 and 13 were identical except one was in respect to the plaintiff Dandurand and the other was in respect to the plaintiff Schnell. Instruction 12, for example, was as follows:

"If you believe from the evidence that at the time and place in question, the plaintiff Dandurand was negligent and that such negligence on his part proximately contributed to cause the alleged accident, then you are instructed that he cannot recover in this case, irrespective of whether you believe the defendant was or was not negligent."

The plaintiff's Instruction 14, which was given, and to which the defendant objected, was as follows:

"The plaintiff, Leroy Dandurand, claims that he was injured while exercising ordinary care, and that the defendant was negligent in one or more of the following respects:

1. The defendant operated his motor vehicle at a rate of speed greater than was reasonable and proper, having regard to traffic conditions and the use of the highway.
2. The defendant operated his motor vehicle without brakes adequate to control the movement of, and stop, and hold said motor vehicle.
3. The defendant failed to keep his motor vehicle under proper or sufficient control.

4. The defendant failed to yield the right of way to the motor truck driven by the Plaintiff, Leroy Dandurand, even though the said motor truck had entered the intersection from an intersecting highway and had passed through the greater portion of said intersection before the vehicle of the defendant entered into said intersection.

5. The defendant failed to light the headlights upon his motor vehicle so as to make his vehicle visible to other drivers upon the highway at a time when it was unusually dark and hazardous to operate his motor vehicle without headlights burning.

6. The defendant failed to do anything whatsoever in the operation of his motor vehicle to avoid collision with the motor truck driven by the plaintiff, Leroy Dandurand, when danger of a collision was imminent and known to the defendant.

The plaintiff, Leroy Dandurand, further claims that one or more of the foregoing was the proximate cause of his injuries.

The defendant denies that he was guilty of negligence in doing any of the things claimed by the plaintiff, Leroy Dandurand, and denies that the plaintiff was in the exercise of ordinary care.

The defendant further denies that plaintiff was injured."

The plaintiff's Instruction 15, to which the defendant also objected, was similar to the plaintiff's 14th, except it applied to the plaintiff Schnell.

The plaintiff's Instruction 17, which was given, and to which the defendant objected, was as follows:

"If you find from the evidence that Leroy Dandurand stopped the truck he was driving near the east right-of-way line of Route 45, and that at the time he started to cross Route 45, vehicle traffic on Route 45 was at such a distance from the intersection that it would not, if driven at a reasonable speed, have reached the intersection before Leroy Dandurand, if driving with ordinary care, would have crossed the intersection, then you are instructed that Leroy Dandurand had the right-of-way."

The foregoing are the defendant's refused instructions and plaintiffs' given instructions which the defendant urges are reversible error.

As to the defendant's refused Instructions 12 and 13, relating to contributory negligence, the defendant urges that the refusal thereof left the jury uninstructed on the significance of contributory negligence on the part of the plaintiff, if proved, -

that the jury was not informed that contributory negligence, if so found, should have an effect on their verdict. Those particular proposed instructions are not in Illinois Pattern Jury Instructions. That, in itself, might, of course, not necessarily preclude their being given, if otherwise proper, appropriate, in conformity with Supreme Court Rule 25-1(a), and if not otherwise covered by some other instruction, but that they are not in I.P.I. is a factor of some initial significance. Beyond that, we believe the jury was adequately instructed on contributory negligence and the significance thereof, if proved, by the plaintiffs' given Instruction 3, and the defendant's given Instructions 8, 10, 11, 14, 16, and 17, considering all the instructions as a series.

The plaintiffs' given Instruction 3 was:

"It is the duty of every driver of a vehicle using a public highway to exercise ordinary care at all times to avoid placing himself or others in danger and to exercise ordinary care at all times to avoid a collision."

The defendant's given Instruction 8 was:

"When I use the words 'ordinary care', I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide."

The defendant's given Instruction 10 was:

"It was the duty of the plaintiff, before and at the time of the occurrence to use ordinary care for his own safety and the safety of his property."

The defendant's given Instruction 11 was:

"When I use the expression 'contributory negligence', I mean negligence on the part of either plaintiff that proximately contributed to cause the alleged injury or property damage."

The defendant's given Instruction 14 set forth the right of way statute as to through highways and concluded by saying:

"If you decide that a party violated the statute on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether or not a party was contributorily negligent before and at the time of the occurrence."

The defendant's given Instructions 16 and 17 were the same except 16 related to the plaintiff Schnell and 17 related to the plaintiff Dandurand. Instruction 17, for example, was:

"The plaintiff Dandurand has the burden of proving each of the following propositions:

First, that the said plaintiff before and at the time of the occurrence was using ordinary care for his own safety.

Second, that the defendant Ellsworth Long acted, or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, the defendant was negligent.

Third, that said plaintiff was injured.

Fourth, that the negligence of the defendant was a proximate cause of the injury to said plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the said plaintiff, but, if, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant."

As the defendant suggests, where, in a particular case, evidence (of habits of due care) is properly admitted the party may have a right to have the jury instructed on the consideration to be given it: ZELLER etc. v. DURHAM (1962) 33 Ill. App. (2) 273; and every party has the right to have the law applicable to his case stated fairly, clearly, distinctly, and conveyed to the jury with substantial accuracy so that the jury may not be misled to his prejudice, and to have the jury instructed upon his theories of recovery or defense, if there be evidence thereof: SIMS v. C.T.A. (1955) 7 Ill. App. (2) 21, HANDELL et al. v. C.T.A. et al. (1961) 30 Ill. App. (2) 1, ARBOIT v. GATEWAY TRANSPORTATION CO. (1957) 15 Ill. App. (2) 500. We believe, however, that those principles were complied with here. There was no error in refusing the defendant's proposed Instructions 12 and 13, under the circumstances.

As to the plaintiffs' given Instructions 14 and 15, relating to the issues, the defendant urges that they included certain matters upon which there was no evidence of the alleged negligence of the defendant, and included certain matters not based on applicable law, - particularly as to the defendant's rate of speed, as

to his operating without brakes adequate to control the movement of, and stop, and hold his vehicle, and as to his keeping his vehicle under proper control, and that the reference to right of way was not in accord with applicable law, and that the reference to the defendant's failing to do anything whatsoever to avoid the collision etc. was not in accord with applicable law but was an expression of the "last clear chance" doctrine which is not law in Illinois.

The plaintiffs' given Instructions 14 and 15 follow the pattern prescribed in ILLINOIS PATTERN JURY INSTRUCTIONS, p. 107. They are, in substance, issues instructions, telling the jury what points are in controversy between the parties; the Committee which prepared I.P.I. recommends that this type of instruction be given, in a clear and concise manner, succinctly stated, without repetition, and without undue emphasis, provided, of course, there is support therefor in the evidence: I.P.I., p. 105-106. The Court was obliged to define the issues for the jury, if requested; but all the law pertinent to the issues in a case need not necessarily be stated in a single instruction: COERTZ v. C. AND N.W.RY. CO. (1958) 19 Ill. App. (2) 261. These instructions were not peremptory: SMITH v. ILL. VALLEY ICE CREAM CO. et al. (1959) 20 Ill. App. (2) 312. In addition to direct evidence, circumstantial evidence was competent here and sometimes is more satisfactory than direct evidence: STINE v. UNION ELECTRIC CO. (1940) 305 Ill. App. 37. Direct evidence of negligence (or due care) is not always necessary, - there may be facts and circumstances from which it can be reasonably inferred: Cf. BERG etc. v. N.Y.C. R.R. CO. (1944) 323 Ill. App. 221; Cf. PANTLEN etc. v. GOTTSCALK (1959) 21 Ill. App. (2) 163. A driver on a preferential highway does not have an absolute or unqualified right of way that can be asserted regardless of circumstances, distances, or speed; he has a duty to observe due care in approaching and crossing an intersection and to drive as a prudent person would to avoid a collision when the danger is discovered or, by the exercise of reasonable care, should have been discovered; it is the

function of the jury to determine whether the judgment of the driver on the preferential highway conformed to the standards of the reasonable and prudent man; a driver who does not maintain a proper lookout for traffic ahead is negligent; if he does nothing to avoid a collision he may, in particular circumstances, be negligent: CONNER v. MCCORMACK (1961) 32 Ill. App. (2) 214. The jury here had to consider all the facts and circumstances in evidence, both from direct evidence and circumstantial evidence. The jury was entitled and required to draw reasonable inferences, deductions, and conclusions from such and from the intendments thereof. They had to weigh the evidence. They had to determine the credibility of the witnesses. They resolved the issues of fact in favor of the plaintiffs. That was within their province. We cannot say there was no competent evidence, direct or circumstantial, and no reasonable inferences they could draw therefrom to sustain their findings so far as the matters referred to in these instructions are concerned. And we cannot say the references therein of which the defendant complains are not in accord with applicable law. Representative of the cases the defendant refers to on this are: CARSON, PILLIE, SCOTT AND CO. v. CHGO. RY. CO. et al. (1923) 309 Ill. 346, HILL et al. v. HILES (1941) 309 Ill. App. 321, PETERS v. MADIGAN (1931) 262 Ill. App. 417, and MAGILL etc. v. GEORGE (1952) 347 Ill. App. 6, - which we do not believe at variance with our views.

As to the plaintiffs' given Instruction 17, relating to right of way, it should first be observed that the defendant's given Instruction 14 on the subject of right of way was as follows:

"The court instructs the jury that at the time and place of the occurrence in question, there was in full force and effect the following law:

'Illinois Revised Statutes 1957, Chapter 95½,
Section 167. Vehicle entering through highway,
stop intersection, or stop crosswalk.

(a) The Department may in its discretion and when traffic conditions warrant such action, give preference to traffic upon any of the State highways under its jurisdiction, upon which has been constructed a durable hard-surfaced road, over traffic crossing or entering such highway by erecting appropriate stop signs or stop lights.

(b) The driver of a vehicle shall stop as required by Section 86 of this Act (Ill. Rev. Stat. 1957, Ch. 95 $\frac{1}{2}$, Sec. 183) at the entrance to a through highway and shall yield the right-of-way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute an immediate hazard, but said driver having so yielded may proceed at such time as a safe interval occurs.'

If you decide that a party violated the statute on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether or not a party was contributorily negligent before and at the time of the occurrence."

The defendant says the plaintiffs' given Instruction 17 unduly re-emphasized the plaintiffs' privilege to proceed across a through highway when a safe interval occurs, without reemphasizing the plaintiffs' duty to yield the right of way to other vehicles approaching so closely on the through highway as to constitute an immediate hazard. A substantially similar instruction was held not to be erroneous in WYOMD V. WERTHEIMER JANTLE CO. et al. (1956) 19 Ill. App. (2) 389. Although the right of way statute read somewhat differently at the time of the occurrence there concerned than it did at the time of the occurrence here involved, the difference would not appear to affect the propriety of the instruction. We do not feel the jury would be misled by the plaintiffs' Instruction 17, under the circumstances. It and the defendant's Instruction 14, read as a series, presented a correct and fair statement of the law. The right of way statute in the form it was at the time of the present occurrence, as recited in defendant's given Instruction 14, has been construed as neither imposing an absolute liability upon the party approaching from the non-preferential highway, nor conferring an absolute right of way regardless of all circumstances on the party

travelling on the preferential highway; there is no precise formula for determining whether a particular vehicle has conformed to set standards, - that question must be determined by the jury, and involves considerations as to relative speeds and distances of the vehicles from the intersection: PENNINGTON etc. v. MCLEAN (1959) 16 Ill. (2) 577. A vehicle on a non-preferential highway, approaching a preferential highway, having yielded the right of way as prescribed by the statute, may proceed on or across the through highway when it can be reasonably ascertained it may do so without danger: Cf. DELEGE v. KARLSEN (1958) 17 Ill. App. (2) 69. The defendant suggests no cases holding an instruction like the plaintiffs' given Instruction 17 to be erroneous and we do not believe it is, under the circumstances.

Considering the instructions as a whole, and as a series, as they must be, we believe the jury was fairly and adequately instructed and could not reasonably have been misled or uninformed on any material proposition of law presented to us. The judgments, accordingly, will be affirmed.

AFFIRMED.

Wright P.J. Concur
Spivey, J. Concur

Abstract

1st DIVISION

41 IA 328

NO. 11731

Abstract

Agenda 10

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
FEBRUARY TERM, A. D. 1963

FILED

P. J. WUNDER
Clerk Appellate Court Second District

RAYMOND H. HADIE and JULIA D. HADIE,

Plaintiffs-Appellees,

vs.

LEONARD S. ERLANDSON and HAZEL V.
ERLANDSON,

Defendants-Appellants.

Appeal from the
Circuit Court,
Winnebago County.

McNEAL, P. J., -

The Circuit Court of Winnebago County entered a decree against defendants Leonard S. Erlandson and Hazel V. Erlandson, quieting title to certain real estate in plaintiffs Raymond H. Hadie and Julia D. Hadie. Defendants appealed to the Supreme Court of Illinois and that court transferred the appeal to this court.

In their complaint filed on December 9, 1961, plaintiffs alleged that they were the owners and then in possession of certain described real estate, and that on November 10, 1955, they entered into an agreement to sell the real estate to defendants. According to the agreement, copy of which was attached to the complaint, defendants agreed to pay plaintiffs \$6000.00, as follows: \$1000 cash on delivery of the contract and the balance in monthly installments of \$50 or more, including interest at 5% per annum, commencing on December 10, 1955, and continuing monthly thereafter "until the principal balance equals Three Thousand Dollars (\$3000.00), when the principal balance with interest accrued must be paid in full." The contract required purchasers to pay all taxes and assessments, provided for forfeiture and termination at sellers' option in case of failure to make payments or any part thereof, and recited that time of payment should be the essence of the contract.

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REF ID: A66561

The complaint further alleged that defendants abandoned the premises in January or February, 1960, that they failed to make the payments for February and March, 1960, and any other payments since then, and that on March 15, 1960, they were served with a notice of forfeiture, which was also attached to the complaint. The notice recited that the monthly installments for February and March, 1960, in the amount of \$50 each were due and unpaid, that if such unpaid amounts together with all subsequent delinquencies, plus fees and expenses, were not paid within 30 days of service of the notice, the agreement would be forfeited and determined and all payments made retained in satisfaction and liquidation of damages sustained, and that a proceeding under "An Act in regard to forcible entry and detainer" would be instituted. Plaintiffs also alleged that they took possession of the premises 30 days after notice of forfeiture and have remained in possession, that they paid the 1959 and 1960 taxes, that in May, 1961 they undertook to sell the premises to another party, that such other party required a quit claim deed from defendants because the abstract shows that taxes paid by plaintiffs had been assessed to Leonard Erlandson, and that defendants refused to execute a deed. Plaintiffs offered to do equity and to convey to defendants upon payment of the balance due on January 10, 1960, amounting to \$3023.60, plus interest, taxes, insurance premiums, and \$545.65 expended for painting, repairs, etc.

On February 5, 1962 the court granted defendants leave to file an answer. In their answer defendants denied all allegations except one. They admitted that Leonard S. Erlandson was the same person as Leonard Erlandson, who was alleged to have been assessed for taxes on the property. On the trial the court examined a number of exhibits and heard the testimony of Raymond H. Hadie, Leonard S. Erlandson and Constable Harvey Crandall who served the notice of forfeiture. On February 8, 1962, the court entered a decree cancelling the agreement and quieting the title to the property in plaintiffs.

Defendants appealed. Their theory on appeal is that the complaint is fatally defective, the notice of forfeiture is fatally defective, the trial court erred in the admission of evidence, and the evidence is insufficient to sustain the decree.

Appellants argue that the complaint is fatally defective because plaintiffs failed to allege the source of their title and actual possession, performance of all conditions, a valid notice of forfeiture, a valid declaration of forfeiture, and a demand for immediate possession. None of these objections was raised in the trial court by motion or otherwise. Section 45 of the Civil Practice Act requires that all objections to pleadings shall be raised by motion, and that the motion shall point out specifically the defects complained of. Section 42 (3) of the Practice Act provides that all defects in pleadings, either in form or substance, not objected to in the trial court are waived. After careful evaluation of plaintiffs' complaint and the seriousness of the alleged defects or omissions, it is our opinion that the complaint nevertheless states a cause of action recognized by law for quieting title to real estate. Under such circumstances we hold that the objections now suggested were waived under section 42 (3), and that they cannot be urged for the first time on this appeal. *Gustafson v. Consumers Sales Agency*, 414 Ill. 235, 244.

Appellants contend that the notice of forfeiture was fatally defective because it does not contain the correct description of the real estate. In the complaint the real estate is described as a part of the northeast quarter of a certain section, beginning at a point in the north line of the section 30 rods west of the northeast corner, thence south 80 rods, thence west 20 rods, thence north 80 rods to said north line, thence east on said north line 20 rods to the place of beginning. As abstracted, the same metes and bounds description appears in the agreement to sell, the notice of forfeiture, the decree, and the deed by which plaintiffs derived title. Appellants' counsel

Defendants' appeal. Their theory on appeal is that the complaint is facially defective, and hence of no force or effect. The trial court, in the opinion of the court, and the evidence is sufficient to sustain the verdict.

It is held that the complaint is not defective.

The complaint is held to be valid and proper.

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points out no specific defect in the description. A comparison of the several descriptions shows that they are substantially the same, except that the descriptions in the agreement and the notice conclude with the words "containing ten (10) acres, more or less", whereas the description in plaintiffs' deed concludes with the words "containing twenty acres, more or less." This variance creates no problem on review because a tract 20 rods by 80 rods obviously contains ten acres rather than twenty, and because the law is well settled that where a description by quantity conflicts with one by metes and bounds, the latter controls, and that by quantity will be rejected. *Branstetter v. Dahnke*, 394 Ill. 40, 45.

Appellants also contend that the payments demanded in the notice of forfeiture were not correct. Assuming that the amounts set forth were not correct, the contract itself provides the measure of payment necessary for reinstatement, and appellants by tendering the amount shown to be due by the contract within the thirty days prescribed by the notice would have been able to avoid a forfeiture. It is not contended that appellants made any attempt to make a tender of any amount. *Montana Land Co. v. N. Pac. Ry. Co.*, 308 Ill. 620, 626.

Appellants also complain that the notice of forfeiture was not signed by plaintiffs but by their attorney, and that it was not served on the defendant, Hazel V. Erlandson, personally. The return on the notice shows that Mrs. Erlandson was served by the constable leaving a copy of the notice with her husband, and he and the constable so testified. In support of these complaints appellants' counsel submits no authority other than references to sections 2 and 3 of the Forcible Entry and Detainer Act (Pars. 2 and 3, Ch. 57, Ill. Rev. Stat. 1961). These sections provide the manner by which a person entitled to possession of lands may be restored thereto, prescribe the form and manner of service of a demand for possession, and provide that the demand shall be signed by the person claiming possession or by his agent or attorney. In proceedings under this Act it has been held

that service of notice on a wife is sufficient notice to her husband. Bell v. Bruhn, 30 Ill. App. 300. Here defendants were not in possession of the property 30 days after notice of forfeiture and plaintiffs had no occasion to commence an action under the Forcible Entry and Detainer Act to obtain possession of their property. In our opinion the provisions of that Act as to signature and service of a demand were not applicable to the notice of forfeiture, and in the absence of any provision in the contract to the contrary, the notice given was sufficient to inform defendants of plaintiffs' intention to determine the contract.

Appellants contend that the trial court erred in the admission of evidence as to ownership of the property. Unless plaintiffs proved title to the real estate, they were in no position to complain that there was a cloud on the title or to ask that their title be quieted. Cerny v. Glos, 261 Ill. 331, 334. Over defendants' objection as not the best evidence, plaintiff was permitted to testify that he was the owner of certain real estate and that the description of the property was as described in the complaint. According to the additional abstract, the court then said: "You want him to run down and get the books?" Defendants' counsel replied, "Yes, sir. That is an issue, but I have a copy if they don't have the original deed -- I have a photo of it and I will use it * * *." On cross-examination plaintiff testified that he had the original deed to the property received in 1948, and that defendants' exhibit looks like a photostat of the original deed. Plaintiffs' attorney stated that he had no objection, and according to the abstract this exhibit was later offered and admitted in evidence. This exhibit shows that plaintiffs acquired title in joint tenancy to the real estate described by warranty deed made and acknowledged by Millard Mann and Myrtle Mann, his wife, on November 5, 1948, and filed for record by the Recorder of Winnebago County on November 29, 1948. Ordinarily a party cannot complain of error in the admission of evidence where he subsequently introduced the same or similar evidence, or where he invited the error. 2 I. L. P. 609, 610, Appeal and Error Pars. 678,

679. Plaintiffs' title to the real estate described in the complaint was established by an exhibit offered by defendants, and they are in no position to complain on this appeal that they were prejudiced by the admission of secondary evidence relative to the ownership of the property.

Appellants also contend that the agreement for warranty deed was not admissible because a provision in the agreement permitting payment of installments until the balance was paid in full was changed to require payment of the balance when it was equivalent to \$3000. Mr. Hadie testified that the change was made before the contract was signed, and Mr. Erlandson testified that the change was made soon thereafter. The trial judge was in a better position than we are to judge the credibility of these witnesses and the weight to be given their testimony. We agree with the trial court's conclusion that if the contract was changed after it was signed by defendants, they consented to and ratified the change by making payments thereafter and for a period of over four years without any complaint.

Finally appellants contend that the evidence is insufficient to sustain the decree, and that there is no evidence showing that plaintiffs had title and were in actual possession of the real estate at the time of the filing of the complaint. The Supreme Court has repeatedly held that where the primary purpose of litigation is to remove a cloud or quiet title in the plaintiff, the failure to allege and prove either plaintiff's possession or the vacancy of the property at the time the suit is filed is a jurisdictional defect. *Rabus v. Calcari*, 16 Ill. 2d 99, 101. Likewise the Court has frequently held that in such a suit not involving vacant and unoccupied lands, proof that the plaintiff at the time the complaint was filed was in possession of the property, claiming in good faith to be the owner thereof under a deed purporting to convey the same to him, is sufficient proof of title. *Glos v. McKerlie*, 212 Ill. 632, 636. It is unnecessary in such a proceeding to show a complete chain of title from the government. *Hooper v. Traver*, 326 Ill. 596, 600.

the admission of evidence, evidence relating to the ownership of the no question to explain on this point that they were provided by was established by an exhibit offered by defendant, and that was in 0-9. Plaintiff's title to the real estate described in the complaint

The evidence shows that the property involved consists of a tract of timber land and a three-room house. Thirty days after March 16, 1960, Mr. Hadie went to the house, took possession, and changed the lock on the door. He cleaned the place, hired a man to replace broken window glass in May and June, and painted the house. He asked Mr. Erlandson what he wanted done with an old rollaway and mattress and a table and couple of chairs left in the house. Mr. Erlandson said that he didn't care what was done with them. Shortly after the 30 days Mr. Erlandson discovered that Mr. Hadie had placed another lock on the property and he saw Mr. Hadie painting the property. This evidence together with defendants' exhibit showing plaintiffs' title to the property tended to prove that plaintiffs were in actual possession of the real estate under a deed purporting to convey title to them at the time of the filing of the complaint, and was sufficient to sustain the decree.

In arguing their final point, appellants' counsel suggests that there is no evidence showing that the agreement for warranty deed was recorded, and that it was not a cloud on the title of the real estate described, unless it was recorded. With this suggestion we agree. Real Estate Impr. Corp. v. Miller, 379 Ill. 375, 387; Howe v. Hutchison, 105 Ill. 501, 506. However, in order that the question of the sufficiency of the evidence to support plaintiffs' case, or a material issue thereof, may be urged for consideration on review, it must be raised by a proper objection in the trial court, and it cannot be considered for the first time on review. 2 I. L. P. 303, Appeal and Error Par. 260. We find no reference to or ruling on this suggestion in the record of proceedings in the trial court, and it is not available for our consideration on this appeal.

As to matters properly presented for our consideration, we find no error in the decree of the Circuit Court of Winnebago County, and the decree is therefore affirmed.

Affirmed.

DOVE, J., and SMITH, J., concur.

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U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, WASHINGTON, D.C. 20250

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(Abstract only)

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Counts I and II of the complaint seek recovery of additional compensation for alleged stabilization work by virtue of

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Paragraph 7 of Specifications of the contract. Count I was for alleged work performed at Kyte Creek and Count II for alleged work performed at Big Island. Counts III and IV ask for additional compensation for extra and additional work beyond that contemplated in the contract, the third count for work occasioned by the relocation of the pipe line after passing under Andalusia Road and the fourth count for required additional depth ordered under a new Interstate Highway.

Pertinent provisions of the contract are as follows:

Paragraph 1 of General Conditions entitled "Definitions" provides, " * * *. 'Engineer' The person, persons, or firm named in the Instructions to Bidders as having prepared the Contract Documents, or other engineers appointed by the Owner for the supervision of construction of the project. * * *."

Paragraph 34 of the General Conditions entitled "Changes-Payments" provides, "The Owner, upon action by its governing body, may authorize changes in the work to be performed or the materials to be furnished pursuant to the provisions of the contract. * * *. No claim for and addition to the contract sum shall be valid unless authorized as aforesaid, * * *. Inspectors and resident engineers are not authorized to act for the Owner in giving orders for the Owner for extra or additional work either in writing or verbally."

Paragraph 2 of the Specifications entitled "Excavation and Trenching" provides, " * * *. The Contractor must assume the risk of meeting quicksand, hardpan, boulders, clay, rubbish, unforeseen obstacles, underground conduits, gas pipe, drain tile, railroad tracks, pavements, etc., and accept payment for all work at the unit prices bid. * * *. Elevation of bottom of trenches to be checked to the satisfaction of the engineer before water mains are laid. * * *."

Paragraph 5 of Specifications entitled "Protection Against Water", provides, "The contractor shall do all pumping and bailing;

Parliamentary, or legislative, control of the police

From the 1971-72 season, the number of birds has increased.

build all drains; and do all other work necessary to keep the excavation clear of ground water, sewage, or storm water during the progress of the work and until the finished work is safe from injury. Where the excavation is in wet sand and suitable construction conditions cannot be obtained by other methods, the Contractor shall install and operate at no additional compensation a pumping system connected with well points, so as to drain the same effectually. * * *."

Paragraph 7 of Specifications entitled "Foundation and Timber" provides, "After the trench has been opened and to grade it will be examined by the Engineer who will determine whether or not it is satisfactory for pipe laying or if it is necessary to stabilize the base, install concrete cradle or drive piling. Any pipe laid in a trench that has not been examined and approved by the Engineer is done so at the Contractor's risk. The Contractor will be allowed additional compensation for this work at prices named (sic) for the different kinds of foundation required in the proposal or specifications. * * *."

Paragraph 8 of Specifications entitled "Line and Grade" provides, "* * *. Whenever obstructions not shown on the plans are encountered during the progress of the work and interfere to such an extent that an alteration in the plan is required, the Engineer shall have the authority to change the plans and order a deviation from the line and grade or arrange with the owners of the structure for removal, relocation or reconstruction of the obstructions. If the change in plans result in a change in the amount of work, a deduction or addition will be made to the contract unit price based on the unit price of the contract."

The plaintiff contends as one of its assignments of error that the verdict of the jury denying recovery was contrary to the manifest weight of the evidence, the prays that the cause be reversed and remanded for a new trial.

In that regard we have reviewed the evidence and what we believe to be a fair summation of the material matters applicable to Counts I and II follows.

John McLaughlin, senior designing engineer of Missman-Stanley-Farmer and Associates, who prepared the plans and specifications for the instant project testified that he occasionally examined the progress of the work but was not in charge of any detailed supervision; that Don Rockwell was the resident inspector and was employed by defendant to make detailed inspections to determine if the water mains were being properly laid; that at Big Island the soil was sandy and water laden; that he observed rock being put in for a distance of about one hundred feet because it was necessary to stabilize the base in that water was boiling up through the sand; and that he saw no other stabilization operations.

He further testified that in his opinion pipe could have been laid on the sandy soil if no water was in the trench; that once water gets into the trench from any source the base of the trench would have to be stabilized; and that only surface water could be pumped out.

He further stated in answer to a hypothetical question that in his opinion water in the trench from the ground or broken tile could be removed by well pointing, and then pipe could be laid on virgin soil.

Ben K. Stilfield, president of plaintiff company, testified as to the conditions at Kyte Creek that for a distance of some two hundred to two hundred twenty-five feet the soil at the flow line (bottom of the trench) was unstable and would not support a man; that no water was entering the trench from the top, that quick sand was below the flow line; and that a sand box was put in place and the water pumped out to the flow line.

He further testified that Rockwell stated that they could not lay the pipe on that kind of base, and upon his instructions,

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after pumping out the trench to the flow line, crushed rock was used to stabilize the base.

He further testified as to the conditions at Big Island that for a distance of about two thousand feet the base of the trench was wet and unstable, and at Rockwell's order to stabilize the base, a sand box was inserted and rock placed in the bottom of the trench to stabilize the ground.

He further testified that some broken tile within this distance had no effect upon water in the trench.

Robert Titcomb, vice-president and general manager of the plaintiff company, testified that at both Kyte Creek and Big Island in the presence of Merle Ausmus and himself Rockwell ordered the stabilization of the base of the trench with rock.

Merle Ausmus, foreman of plaintiff company, also testified that at Kyte Creek and Big Island Rockwell had ordered a rock stabilization of the base of the trench.

Don Rockwell, assistant city engineer for defendant, testified that he was the inspector on the instant project; that he represented the defendant city, and that one of his duties was to inspect the trenches before the laying of the pipe; that at Lyte Creek upon inspecting the base of the trench they were not in a position to lay the pipe and that he might have entered into conversations about stabilization and he might have told Ausmus to put in the rock.

He further testified with reference to Big Creek that he told Ausmus it would be a good idea to put in the rock; that when the trench was open water and sand flowed back into the trench; that it was a bad spot and that he had ordered stabilization at that time.

He further testified that it was possible to lay the pipe without stabilization.

Donald Smith, acting city engineer for defendant, testified that during the installation of the instant project he was involved in other projects; that he only spent a small amount of time on this particular job and that Rockwell and two other men represented the city on that project; that he relied upon Rockwell, who was representing the city, and it was his duty to inspect the trench for the laying of the pipe.

He further testified that on one occasion he saw ground water and water from a broken tile running into the trench.

The contract provided that the top of the water pipe must always be five feet under the surface of the ground. To maintain this depth plus the twenty-four inch pipe it was necessary to excavate (open) the trench to a depth of seven feet which was designated as the base of the trench or the flow line.

Where the interests of justice demand it a reviewing court will reverse in cases when the verdict is clearly against the manifest weight of the evidence. (Orban v. Stoll, 328 Ill. App. 398, 66 N. E. 2d. 316 and Dobie v. Livengood, 12 Ill. App. 2d. 343, 139 N.E. 2d. 599.).

Plaintiff argues that the evidence shows a clear cut case of stabilization contemplated by Paragraph 7 of Specifications. Defendant on the contrary says that the work involved was performed under plaintiffs obligations enumerated under Paragraphs 2 and 5 of Specifications.

From a review of the foregoing testimony of all the witnesses, regardless of by whom they were called, we conclude that the verdict of the jury as to Counts I and II was clearly against the manifest weight of the evidence.

Count III was predicated upon the theory of extra and additional work beyond that contemplated by the contract.

When the project approached Andalusia Road an addendum was added to the specifications. Instead of breaking the pavement and laying the pipe across the road in an open ditch the plaintiff was ordered to furnish a steel casing pipe from Station 57 + 25.74 to Station 57 + 61.74. This casing pipe was to be pushed or augered under the highway and the water main installed within that pipe.

Plaintiff was reimbursed for the extra and additional work of installing the steel casing pipe. However, plaintiff contends that by virtue of this addendum and in making the turn along Andalusia Road after passing thereunder, the line of the trench was moved three and one-half feet further from the center of the road. In moving the line plaintiff contends that he was forced to additional expense in opening the trench along Andalusia Road.

Alluding to Count III, Ben K. Stilfield testified that Don Rockwell established a new line along Andalusia Road by setting line stakes; that he told Rockwell of the additional work involved in following the new line; and that he wished to return to the line designated in the plans.

Don Rockwell testifying in this regard said that he did not establish a new line but that the machine had to start at the pipe and the line was thereafter controlled by the machine.

Plaintiff urges that its right to additional compensation is provided for by Paragraph 8 of Specifications. Defendant on the other hand argues that this change amounted to extra and additional work covered by Paragraph 34 of General Conditions.

Plaintiff makes no contention that the extra or additional work as alleged in Count III of its complaint was authorized by the owner acting through its governing body under Paragraph 34 of General Conditions or ordered by the addendum to the contract, but rests its right to recovery to a change in line authorized by Don Rockwell under Paragraph 8 of Specifications.

In addition to the conflict in the evidence relating to the establishment of the new line being a question of fact for the

jury to determine, there is an additional more compelling reason to affirm the judgment as to Count III.

As we view Paragraph 8 of Specifications, the encountering of obstructions not shown on the plans which would authorize the engineer to change the line of the trench would be those obstructions owned by a third party capable of being removed, relocated or reconstructed. This being so we conclude that neither the pleadings contemplated nor Paragraph 8 of Specifications covered the subject matter alleged in Count III.

Plaintiff confines a large portion of his argument to alleged errors by the trial court in ruling upon and modifying tendered instructions. In view of what we have said it would be unnecessary to pass upon these alleged errors.

We have, however, examined the instructions, rulings and modifications and find no reversible error. We hasten to sympathize with the trial court in the lot cast upon him by the instruction conference. The tendered instructions were anything but a model of perfection. The modifications made by the trial court, if anything, tended to clarify the instructions.

The primary duty rests upon counsel for the parties to tender clear, concise and well thought out instructions.

The judgment of the Circuit Court of Rock Island County is affirmed as to Count III, reversed and remanded for a new trial as to Counts I and II.

Affirmed in part and reversed and
remanded in part for a new trial.

WRIGHT, P.J. and CROW, J. Concur

$$(3) \quad \text{if } C \in \mathcal{C} \text{ and } C \neq \emptyset, \text{ then } C \text{ is a } \mathcal{C} \text{-set.}$$
[illegible]

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, A.D. 1963

LESTER LANE,
Plaintiff-Appellant,
vs.
JOHN WARREN, individually, and
JOHN WARREN, d/b/a JOHN WARREN
EXCAVATORS, and/or JOHN WARREN
EXCAVATING COMPANY, and UNKNOWN
CRANE OPERATOR,
Defendants-Appellees.

Appeal from the
Circuit Court of
Will County.

CROW, J.

In this suit the complaint alleged, Count I, that the plaintiff, Lester Lane, was working as a laborer for R. T. Johnson Company, in the construction of the Lincolnway School, in Will County, Illinois; he was working near a certain crane used in the erection and construction; John Warren, d/b/a John Warren Excavators, and in other capacities named in the suit, "owned, controlled and maintained a certain crane which was then and there being operated by their agent, servant and employee"; that the defendant had certain duties under the Structural Work Act; the defendant "wilfully and knowingly erected and constructed, furnished and maintained, placed and operated, an unsafe, unsuitable and improper crane" and "wilfully and knowingly furnished a crane with a defective boom mechanism not adequate for the job that it was intended to do"; as a result of such "wilful or knowing" acts or omissions, the boom of the crane was caused to break and collapse, striking and injuring the plaintiff, who was working thereunder. Liability was predicated on Section 69 of the Structural Work Act, which im-

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poses liability upon "any owner, contractor, subcontractor * * " for any wilful violation of the act. Count II alleged common law negligence in inspecting, maintaining, erecting, controlling, loading, and operating the crane so that, while under the exclusive care, custody and control of the defendant it broke and collapsed, injuring the plaintiff. The answer of the defendant, in substance, denied the allegations of the complaint, including those with reference to the operation and control of the crane and as to the crane operator being the defendant's agent, servant, and employee, admitted the existence of the Structural Work Act, and denied its application. A jury found the issues in favor of the defendant on the issue of liability, the trial being limited to that, and a judgment for the defendant was entered on the verdict. The plaintiff appeals, his post trial motion for judgment notwithstanding the verdict, or new trial, having been denied.

The errors relied on by the plaintiff for reversal are: (1) the failure to give certain instructions, namely, the plaintiff's tendered Instructions Nos. 9, 6, and 4; (2) the admission of evidence relative to the "loaned servant and equipment" doctrine under a general denial without pleading such as an affirmative defense; (3) inflammatory and prejudicial statements of defendant's counsel in his opening statement and in his closing argument; (4) the reading of parts of the Structural Work Act to the jury by the defendant's counsel in argument; and (5) the refusal to require the defendant to produce certain photographs of the crane and boom at the close of the plaintiff's evidence.

It is the defendant's theory that the crane was not under the direction and control of the defendant at the time; prior to the accident the crane worked perfectly; the crane was under the

direction of R. T. Johnson and Co., the general contractor; there was no error in refusing the plaintiff's instructions of which complaint is made; the defendant's answer raised an issue of fact as to his operation and control of the crane; there was no error in defendant's counsel's remarks in the opening statement or closing argument; and there was no error, in refusing, at the close of plaintiff's case, to compel the defendant to produce photographs.

There was testimony that the defendant owned the crane; R. T. Johnson and Co. were the general contractors on a construction project; the defendant Warren was the excavating subcontractor thereon; the crane, with the operator, a regular employee of the defendant, was leased at this particular time to R. T. Johnson and Company by the defendant Warren; Warren billed Johnson at the rate of \$12.50 per hour for the use of the crane, with the operator; the supervision of this crane at the work site at this particular time was by R. T. Johnson men, and Clarence Kelsey was the superintendent in the employ of R. T. Johnson and Company and directed the placement of the crane, as to where it was to be used. The foreman was an employee of the general contractor. Kelsey himself was also a union operator of a crane and, prior to the particular time of this occurrence, the crane bucket, with Kelsey operating it, had accidentally struck two air conditioners on an adjoining building. This crane had been on the job site for three or four weeks before the accident, and the operator, for the most part, was one Martin Stafschoidt, the defendant's employee, who had since died, and he was the crane operator at the time of this accident. He was an experienced crane operator.

The crane was equipped with a boom, made up of various sections of varying lengths. The sections were twenty to twenty-two feet long. The boom's full length was 40' - 45'. To do excavating a clam was

attached to the crane by means of cables, running through the boom end to the cab of the crane where the controls were located. At the time of the occurrence, however, the crane was not being used for excavation. Instead of the clam, the attachment being used was a large drum or bucket for carrying wet cement.

The plaintiff, on September 1, 1959, was part of a four-man crew, employees of R. T. Johnson and Co., the general contractor, who were engaged in pouring cement into columns or piers as part of the building foundation. This was a part of the general contractor's job, - it was not a part of the subcontractor excavator's job. The pouring was taking place in an excavation. A cement mixer truck was parked on the edge or bank of the excavation at some distance from the columns to be poured. The crane was in the excavation. Equipped with the cement bucket, the crane was being used to carry the wet cement from the "readi-mix" truck, by swinging it around in an arc, to the forms being filled with the cement. A wood scaffold was erected around the piers or forms on which the men were working, the scaffold being 4' - 6' from the ground. After picking up a load of cement in the bucket from the truck, the crane then swung the bucket around in an arc, over the column to be poured. The crane operator was directed by hand signals from one Raymond Larsen, an R. T. Johnson and Co. employee, on the scaffold, who indicated where the bucket was to stop. The opening and closing of the bucket was done by the general contractor's men on the scaffold, but the controls for swinging the boom and raising and lowering the bucket were in the cab of the crane and were manipulated by the crane operator.

The plaintiff at the time of the accident, September 1, 1959, was on the ground, not far from the scaffold, and was getting a vibrator machine into position to agitate the concrete while it was being poured. As the boom of the crane swung over the scaffold, the

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boom suddenly buckled and bent. The cement bucket came crashing down on the scaffold and forms of the pier, shattering both. The scaffolding pinned the plaintiff, injuring him. All of the men who supervised the use of the crane at the site were R. T. Johnson and Co. men. Neither Larsen, Axel Johnson, or Clarence Kelsey, - general contractor's employees, - observed any defects in the boom before. Kelsey, the superintendent, said it operated perfectly. After the accident the defendant said there was a slight buckle in the boom, 8' - 10' from the cab end.

The plaintiff's tendered Instruction No. 9, which was refused by the Court, was as follows:

"When I use the word 'wilfully' in these instructions this word is synonymous with the word 'knowingly'."

This was not from Illinois Pattern Jury Instructions.

It is to be observed that the defendant's given Instruction No. 1 and the plaintiff's given Instruction No. 8 referred specifically to the defendant's responsibility if he wilfully or knowingly violated the Structural Work Act.

The defendant's given Instruction No. 1 was:

"The plaintiff has the burden of proving each of the following propositions:

First, that the defendant had charge of the operation of the crane out of which the occurrence arose;

Second, that the defendant wilfully violated the provisions of the Structural Work Act in question in one or more of the following respects:

A. Wilfully or knowingly erected and constructed, furnished and maintained, placed and operated an unsafe unsuitable and improper crane;

B. Wilfully or knowingly failed to erect and construct, furnish and maintain, place and operate a safe, suitable and proper crane;

C. Wilfully or knowingly furnished a crane with a defective boom;

D. Wilfully or knowingly erected and furnished a crane with a boom that was not adequate for the job that it was intended to do.

Third, that wilful violation of the Structural Work Act by the defendant was a proximate cause of the occurrence in question.

If you find from your consideration of all the evidence that each of the propositions required of the plaintiff has been proved, then your verdict should be for the plaintiff. If on the other hand, you find from your consideration of all the evidence, that any one of the propositions the plaintiff is required to prove has not been proved, then your verdict should be for the defendant."

The plaintiff's given Instruction No. 8 was:

"The plaintiff claims that this occurrence took place and that the defendant wilfully or knowingly violated the statute known as the Structural Work Act in one or more of the following respects:

Wilfully or knowingly erected and constructed, furnished and maintained, placed and operated an unsafe, unsuitable and improper crane;

Wilfully or knowingly failed to erect and construct, furnish and maintain, place and operate a safe, suitable and proper crane;

Wilfully or knowingly furnished a crane with a defective boom mechanism;

Wilfully or knowingly erected and furnished a crane with a boom that was not adequate for the job that it was intended to do.

The plaintiff further claims that one or more of the foregoing was the proximate cause of this occurrence.

The plaintiff (defendant) denies that he was guilty of any wilful or knowing acts or omissions as charged by the plaintiff."

Under the circumstances, the matter being adequately covered by other given instructions, the refusal to give plaintiff's Instruction No. 9 was not error.

The plaintiff's tendered Instruction No. 6, which was refused, was:

"When a person takes on an ultra hazardous activity such as operating a crane, he is liable for any accident proximately caused by that activity regardless of the amount of care used."

No authority is referred to justifying the giving of this in this type of a case. This instruction was designed apparently to fix an absolute liability on the defendant, as for a wilful violation of the Act, regardless of whether there was a wilful violation, and whether the defendant knew or did not know or should or should not have known of any violation. This is not in accord with the statute, and we think the Trial Court committed no error in refusing this instruction. The Structural Work Act provides, so far as material, CH. 48 ILL. REV. STATS., 1961, pars. 60, in part, and 69, in part:

"60. Sec. 1. That all * * * * cranes, * * * erected or constructed by any person, firm or corporation in this State for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed, in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon.

* * * * *

"69. Sec. 9. Any owner, contractor, sub-contractor, foreman or other person having charge of the erection, construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure within the provisions of this act, shall comply with all the terms thereof. * * * * *

For any injury to person or property, occasioned by any wilful violations of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby; * * * * *

The Act imposes a statutory liability in cases of wilful failure to comply with it upon the person having charge; before liability can

be imposed upon a defendant thereunder it must be established that he wilfully violated the terms thereof; "wilful violations" of the Act, or "wilful failure to comply with any of its provisions" means knowing violation or knowing failure to comply: OLDHAM v. KUBINSKI et al. (1962) 37 Ill. App. (2) 69.

The plaintiff's refused Instruction No. 4 was:

"Martin Stafsholt was the employee of the defendant, John Warren, at and before the time of this occurrence. Therefore any act or omission of the employee at that time was in law the act or omission of the defendant, John Warren."

This type of instruction should not be given where there is an issue of fact as to agency: ILLINOIS PATTERN JURY INSTRUCTIONS, P. 214.

This, under the circumstances here presented, would have invaded the province of the jury. That was one of the issues the jury had to decide. It was, at most, a disputed question of fact whether this defendant could be deemed to be in charge of the work within the meaning of the Structural Work Act, and it was the province of the jury, under proper instructions, to make that determination: OLDHAM v. KUBINSKI et al., supra. Further, it is to be observed that plaintiff's given Instruction No. 12 was:

"One of the questions for you to determine is whether or not Martin Stafsholt was acting within the scope of his authority.

An Agent is acting within the scope of his authority if he is engaged in the transaction of business which has been assigned to him by his principal, or if he is doing anything which may reasonably be said to have been contemplated as a part of his employment. It is not necessary that an act or failure to act must have been expressly authorized by John Warren."

Under the circumstances there was no error in refusing the plaintiff's Instruction No. 4.

The answer of the defendant denying, inter alia, the allegations of the complaint as to the maintenance, operation, and con-

trol of the crane and the operation thereof by his alleged agent, servant, and employee, raised an issue of fact. The plaintiff contends that the defendant should have pleaded an affirmative defense setting up "loaned servant and equipment", and, failing to do so, certain evidence of the defendant concerning the loan of the crane and equipment was inadmissible. We think there is no merit in this contention. The defense of the defendant in this regard does not give color to the plaintiff's claim and then assert new matter by which the apparent right is defeated, and is not an affirmative defense: CUNNINGHAM v. CITY OF SULLIVAN (1958) 15 Ill. App. (2) 561. See: MERLO et al. v. PUBLIC SERVICE CO. etc. et al. (1942) 381 Ill. 300. The jury has decided the fact issue favorably to the defendant. Further, the plaintiff failed to object to any evidence in this respect on the grounds of variance and to point out specifically such claimed variance, and the point urged is, therefore, waived: HEAD v. WOOD (1959) 20 Ill. App. (2) 97.

In his opening statement to the jury the defendant's counsel said, in part, in referring to the defendant's crane, "It was there at the request of R. T. Johnson and Company who are not named defendants in this case * * * ". The plaintiff's counsel objected. He now urges that as a grounds for reversal. The whole opening statement is apparently not abstracted. Nor is any of the opening statement of counsel for the plaintiff abstracted. There was evidence later adduced tending to support the first part of that sentence. The last part, - that R. T. Johnson and Company are not named as defendants, - was an obvious matter of record, - evident to the jury and Court, - for whatever, if anything, it was worth. It is difficult to see how that Brief comment, - apparently not repeated, - in the defendant's opening statement can be considered

prejudicial or a substantial grounds for reversal, and we think it is not, under the circumstances. The scope and extent of an opening statement rest largely in the sound discretion of the trial court: 34 I.L.P. p. 520.

The plaintiff further contends that defendant's counsel introduced racial prejudice into the trial, the plaintiff being a colored man, in his closing argument to the jury. A portion of this argument was as follows:

"* * * I am not blind to the fact that it is difficult - that plaintiff is a colored man and we are a white contractor - I am not blind to any of the problems that must be settled by you, but may I caution you, that your job is a matter of justice - this is not a matter of charity and in this area you are touched by a little bit of the Divine, and justice is your job. My conviction is if you do your job properly, you will find Mr. John Warren not guilty."

The plaintiff's counsel made no objection to these remarks at the time, nor until the filing of his post trial motion. By reason of his failure to make an objection at the time we think the objection, if it were otherwise good, is waived and there is no merit therein, under the circumstances: 34 I.L.P. p. 542. Moreover, considering the whole context of the argument, the indicated reference does not necessarily carry the invidious connotation attributed to it by the plaintiff. And it was not repeated.

The plaintiff claims error in the claimed act of defendant's counsel in reading parts of the Structural Work Act to the jury at the time of his closing argument. The plaintiff's attorney, again, failed to object at the time. We think the reading, as such, of parts of the Act, if that is what occurred, may have been error, though counsel may present their view of the law in argument (MARRIAGE v. ELECTRIC COAL CO. (1912) 176 Ill. App. 451; 34 I.L.P. p. 528),

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but the plaintiff having failed to object at the time cannot now complain thereof. Furthermore, the plaintiff's counsel also read, in effect, parts of the Act to the jury, even including reference to the criminal provisions thereof, which was clearly uncalled for here, and can hardly be heard to complain.

Finally, it is urged that the Trial Court at the close of the plaintiff's case erred in refusing to compel the defendant to produce at the trial certain photographs of the boom and crane. The Court, in refusing the request, made the following remarks:

"The Court will deny the motion of counsel for plaintiff in view of the fact that counsel has had adequate opportunity to photograph the boom. He or his law firm having had the compensation case in this matter and that there is no showing that the photographs taken actually have evidentiary value in view of the time that they were taken and the fact that the boom had been out of use for a number of months and there is testimony in the record that care of the boom is essential in this case and for other reasons that the Court believes to be obvious and needless to mention."

The plaintiff was on notice, by interrogatories and answers, long before trial that the defendant had certain photographs of the crane or boom. He had been told who the photographer was. He had been told the defendant's counsel had copies. He evidently made no effort before trial to obtain, or even request copies from the photographer or defendant's counsel. Further, there is no indication the photographs would have had any probative value. Having waited until the close of his own case to make this request at the trial we think, under the circumstances, the refusal to compel the defendant to produce the photographs at the trial was not error. This is not a case of pre-trial discovery of a statement obtained from the opposite party, as was involved in STIMPERT v. ABDIMOUR et al. (1962) 24 Ill. (2) 26, to which the plaintiff refers.

We find no reversible error and the judgment will be affirmed.

Wright P.J. Concur
Spivey J. Concur

A F F I R M E D .

Abstract

41 LA-378

No. 11732

Publish Abstract Only

Agenda 17

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, SECOND DIVISION
FEBRUARY TERM, A. D. 1963

THE PEOPLE OF THE STATE OF ILLINOIS)
ex rel CLINTON GRAY, JOSEPH NEWMAN,)
LEE MILIER, HAROLD E. SHIPEE,)
MARLOW DODGE, WILLIAM F. BURDEN,)
and JAY G. BLACK, individually and)
as the BOARD OF EDUCATION OF SCHOOL)
DISTRICT NO. 122, WINNEBAGO COUNTY,)
ILLINOIS,)

Plaintiff-Appellee,)

vs.)

THE CITY OF ROCKFORD, ILLINOIS,)

Defendant-Appellant.)

Error to Circuit
Court of Winnebago
County.

WRIGHT -- P. J.

This was a Quo Warranto action filed by the State's Attorney of Winnebago County with relators against the City of Rockford attacking the validity of the annexation of certain territory to the City of Rockford. The trial court determined that the territory sought to be annexed exceeded sixty acres and that, therefore, the City of Rockford exceeded its authority under the provisions of Chapter 24,

... ..

Illinois Revised Statutes, 1959, Section 7-11. The trial court found the annexation void and this appeal is from the judgment of ouster.

On February 13, 1961, defendant, City of Rockford, passed an ordinance to annex certain territory to the city. This ordinance and the legal description attached to it, provided, in part, as follows:

"Whereas, there exists an unincorporated territory which is wholly bounded by the City of Rockford, the Rock River and the City of Loves Park, and that territory contains less than sixty (60) acres,

Now, Therefore, Be It Ordained By
The City Council of The City of Rockford,
Illinois:

Section 1. That the territory described by the attached property description be and the same is hereby annexed to and made a part of the City of Rockford.

Section 2. That all such territory be and constitute a part of the First Ward of the City of Rockford.

Section 3. That the City Clerk of the City of Rockford shall, after passage and approval of this ordinance, file the map of such annexed territory together with a copy of this ordinance for record in the Office of the Recorder of Deeds of Winnebago County, Illinois.

Book 29 Page 276

All that part of the SW $\frac{1}{4}$ of Section 7 and the NW $\frac{1}{4}$ of Section 18, T44N, R2E of the Third P. M., and the NE $\frac{1}{4}$ of Section

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13, T44N, R1E of the Third P.M. bounded by the Rock River and the Corporate Limits of the City of Rockford on the West, the Corporate Limits of the City of Rockford on the south, the Corporate Limits of the City of Rockford on the east, and the Corporate Limits of the Cities of Rockford and Loves Park on the North, comprised of 55.15 acres, more or less."

There was a map attached to and filed with the annexation ordinance by which the territory purportedly annexed is circumscribed by a heavy line.

The answer filed by the defendant alleged affirmatively that the territory was annexed under the provisions of Chapter 24, Illinois Revised Statutes, (1959) Section 7-11, and that the annexation conformed to the requirements of this statute. This statute provides as follows:

"7-11. S 7-11. Annexation of surrounded or nearly surrounded territory.) Whenever any unincorporated territory, containing sixty acres or less, is wholly bounded by one or more municipalities or is wholly bounded by one or more municipalities and a river or lake, such territory may be annexed by any municipality by which it is bounded in whole or in part, by the passage of an ordinance to that effect. The ordinance shall describe the territory annexed and a copy thereof together with an accurate map of the annexed territory shall be recorded in the office of the recorder of deeds of the county wherein the annexed territory is situated. As amended by act approved July 24, 1951. L. 1951, p. 1792."

Defendant's answer further alleged that the territory

sought to be annexed consisted of 55.15 acres and the annexation conformed to the requirements of the statute.

The People's reply alleged that the territory purportedly annexed contains 86 acres and that the territory is not wholly bounded or surrounded in accordance with the statutory requirements.

The trial court in its judgment of ouster found and determined that the lands sought to be annexed includes Rock River and that the area described is in excess of sixty acres and the annexation is, therefore, null and void.

It is the theory and contention of the defendant that its ordinance by any reasonable construction does not include the Rock River and that the ordinance annexing the territory is valid.

It is mandatory that an accurate map of the annexed territory shall be recorded in the Office of the Recorder of Deeds of the county wherein the annexed territory is situated. Section 7-11, Revised Cities and Villages Act, supra. Such a map was filed in this case. On the map, a heavy line circumscribes the territory purportedly annexed to the City of Rockford and unmistakably this line follows the west bank of the Rock River and in so doing, includes the Rock River in the territory annexed. The Mayor of the City of Rockford certified the map to be a "true, correct and accurate

map" of the annexed territory. The map is unambiguous and the defendant in its brief concedes that "it is obvious" that the map fixes the west bank of the Rock River as the west boundary of the annexed territory. The legal description in the annexation ordinance is ambiguous in that it states "bounded by the Rock River and the corporate limits of the City of Rockford on the west." It is not clear what is meant by "Rock River... on the west." This could either mean the east bank, the west bank or even the center of the stream.

Since the map attached to and filed with the ordinance in the instant case undisputedly fixes the west bank of the Rock River as the west boundary of the annexed territory, the erroneous description in the ordinance, which fails to definitely fix the west boundary of the territory annexed as being either the east bank, west bank or center of the Rock River, and is, therefore, ambiguous will be construed so as to conform with the unambiguous map. *People ex rel. Cameron v. New*, 214 Ill. 287; *People ex rel. Village of Worth v. Ihde*, 23 Ill. 2d 63, 177 N. E. 2d 313; *So. Parkway Bldg. Corp. v. So. Center Dep. Store*, 19 Ill. App. 2d 14, 153 N. E. 2d 291.

When the ambiguity in the legal description set out in the ordinance is resolved consistently with the unambiguous

map attached to and filed with the ordinance which fixes the west bank of the Rock River as the west boundary of the annexed territory, the territory comprises more than sixty acres in violation of Section 7-11, Revised Cities and Villages Act, supra., and such purported annexation is null and void.

A city or village has no power to extend its boundaries except as authorized by the legislature and such power when delegated to the municipality must be exercised by it under the circumstances and in the manner prescribed by statute. People ex rel. Universal Oil Products Co., v. Village of Lyons, 400 Ill. 82, 79 N. E. 2d 33; City of East St. Louis v. Touchette, 14 Ill. 2d 243, 150 N. E. 2d 178. The statute relied upon by the defendant provides that the municipality may annex unincorporated territory, "containing 60 acres or less" and since the trial court properly determined that the territory purportedly annexed in this proceeding exceeded sixty acres, the judgment of ouster should be and the same is hereby affirmed.

A F F I R M E D.

J. M. Conner
Spencer J. Conner

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PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

SERGIO ZAMPA and SALVADORE
GIOVINGO,

Plaintiffs in Error.

WRIT OF ERROR TO THE
CRIMINAL COURT OF
COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendants Sergio Zampa and Salvatore Giovingo were indicted together with one George Theisen for the offense of pandering (Ill. Rev. Stat., ch. 38, § 170 (1959)), by knowingly receiving the earnings from the practice of prostitution by Kelly Burghy and Denese Robb, and further for conspiring to do divers illegal acts injurious to the public morals; that is to say, to (1) foster, encourage, aid and abet the practice of prostitution; (2) knowingly take money from the earnings of prostitution; (3) procure men for the practice of prostitution; and (4) advise how much to charge for an act of prostitution. Defendants waived a jury trial and in a bench trial were convicted and sentenced to one year in the county jail. Theisen was also convicted and was sentenced to serve three months in the county jail, such sentence to run concurrently with another sentence he was serving. He does not join in this appeal.

Denese Robb testified that she was 16 years old; that on November 9, 1961 she went to the Club Bambi Lounge at 357 North Clark Street, Chicago, where she saw defendant Zampa, a bartender there. She told him that she was looking for a job as a prostitute. He asked whether she had any experience, and

she said no. She told him she was nineteen years old. While she was talking to Zampa, defendant Giovingo joined the discussion. He asked her how old she was, and she said twenty. He again asked her how old she was, and she said twenty-one. He asked again, and this time she said twenty-two. She was told there were rooms upstairs used for customers. Defendants told her how to go over to a customer, talk to him, get him to buy a drink, and to suggest going upstairs, and then to have an act of prostitution. They told her to ask for \$20 for the act of intercourse and \$3 for the room; that she would receive 60% of the money, and they, 40%. Later that day she solicited customers, Zampa gave her the key to a room, and she had sexual intercourse with two customers, receiving \$35 as her share of the money taken in.

On November 21st, 22nd and 24th, 1961, she worked as a prostitute under the same circumstances. On December 10, 1961 she returned to the Club Bambi Lounge with another girl, Kelly Burghy, whom she introduced to the defendants. Defendants told Burghy that for each act of prostitution, they would split the money with her, half and half. Kelly had one customer that day. On the following day she had approximately four customers. Prior to each act of prostitution, one of the defendants gave her the key to an upstairs room, and later one or the other defendant received the proceeds from her for the act of prostitution. At the end of that day she received \$40 from defendants as her share. On December 12, 1961 she also performed acts of prostitution at the club. Prior to one of such acts she

received the key to a room from Zampa. When she came back, she gave the money she had received to Theison. She has not been back to the club since that day. The defense offered no evidence.

The first point made by defendants is that they were not proven guilty of a substantive offense. The evidence is so clear on this point, it is difficult for us to understand what is meant by that denial. It appears, however, that under the pandering act, the state is required "to identify the particular transactions;" that the information must specify the time, place and person; and defendants contend there was no compliance with the requirement because they did not receive the earnings of Denese Robb on the precise date alleged, December 12, 1961. The proof is that one or both of the defendants received the earnings of Denese Robb for acts of prostitution on November 9th, 21st, 22nd and 24th, 1961, and that one or both of the defendants received the earnings of Kelly Burghy from acts of prostitution on December 10th, 11th and 12th, 1961. A slight variance between the date of the offense, as alleged in the indictment, and the dates proven at the trial is not a fatal defect. People v. Schmidt, 10 Ill.2d 221, 139 N.E.2d 726; 21 I.L.P., Indictments and Informations, § 115.

The second point made by defendants is that they were not proven guilty of conspiracy as charged. The point here again involves dates. In this instance defendants contend that any conspiracy with reference to Burghy could have been formed only on December 10, 1961, the first day on which she came to the Club Bambi Lounge, although the pleading fixes the date

as December 12, 1961. The argument is too farfetched to justify reversal on that ground. Criminal prosecutions must not be hedged in by such technical details as would make it almost certain every trial would have an abundance of errors.

The third point made by defendants is that they were "prejudiced" by incompetent evidence. A police officer testified to acts of solicitation involving the codefendant Theisen. The trial court hearing the case without a jury struck his testimony from the record. Defendants contend that nevertheless it may well have impressed the trial court and thus have prejudiced him against them. This was a trial judge particularly experienced and competent in criminal law. He was entirely capable of separating the wheat from the chaff. We find no error of substance in this record.

Judgment affirmed.

Dempsey, P.J., and McCormick, J., concur.

Abstract only.

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Appeal from the  
Circuit Court of  
St. Clair County,  
Illinois.

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sisted of a diesel engine with cab at the rear and 69 freight cars. Upon warning from the fireman, the engineer applied sand and the emergency brakes with the airline connected to the entire train. When it stopped after striking the car, the engine was partly off the street on the west side. There were industrial buildings on that side, but the east side was vacant property. Otherwise the testimony was conflicting and the facts in dispute.

The issues involved the charge that plaintiffs exercised due care for their own safety, and the charges of negligence of defendants in failing to give the warnings required by law, and failure to have the train under proper control, considering the hazardous nature of the crossing.

The plaintiffs testified there were patches of fog that night, and the crossing was partly obscured by smoke and steam from the industrial plants. Witnesses for the defense testified the night was clear, and they saw no smoke or fog to obscure the crossing. Weather charts indicate the wind was from the southeast to the northwest. Trokey was dozing at the time of the collision, but asserts he had noticed the smoke and steam from the plant about a block and a half before they reached the crossing and had mentioned the fact to the driver.

Garrett, the driver, testified to seeing smoke and flame from the plant. He said he stopped at the first track and looked to the right and left, also lowered a window a couple of inches, but saw and heard nothing. (No contradiction on these points.) That he then drove on about 25 feet to the next track in 1st or 2nd gear, and stopped again, as he looked to the right he saw the headlight only when the collision was about to happen. A photograph of the damaged car indicates the point of heavy impact was somewhere over the right front

wheel.

The engineer and a third man in the cab were not in position to see the car or collision, but they corroborate the fireman as to his warnings. The fireman saw the car and warned that it did not appear to be stopping, that it would race in front of the engine and that a collision was imminent. At this time the engineer applied the air. All of them said the headlight was burning "bright", and the bell ringing and whistle blowing.

There was other traffic on the street. Another car, not identified, had crossed going north ahead of plaintiffs. A south bound car stopped at the tracks in time to avoid a collision. A man was driving, with his wife at his left and a daughter in the rear seat. They, also, said visibility was not hindered, but in other respects their testimony was not adverse to plaintiffs, perhaps it was favorable in some respects.

The defense also recites the movements and activities of the plaintiffs for much of the day and the evening up to the time of collision as elicited from the parties. This evidence is not repeated here, since it is not contradicted and, if taken as true, it has no bearing on the issues.

The points in defendants' brief set out some rules and authorities, some of which are here summarized: If there is a total failure to prove an essential element in plaintiff's case, a directed verdict should be entered. *Tucker v. N. Y. etc. RR.*, 12 Ill. 2d 532. Negative testimony has no probative value except under certain circumstances. *Berg v. N.Y.C.RR.*, 391 Ill.52. A passenger has no right to omit reasonable efforts on his part to avoid danger. *Dee v. City of Peru*, 343 Ill. 36. A person must see and hear what circumstances show was visible and audible. *Sheehan v. C. & N. W. RR.*, 269 Ill. App. 477.

If a familiar crossing is obstructed, the duty of a traveler is enhanced rather than excused. Overman v. I.C. RR., 34 Ill. App. 2d 30. The Appellate Court should reverse and remand when the verdict and judgment are contrary to the manifest weight of the evidence. Ellers v. C.T.A., 2 Ill. App. 2d 233.

The plaintiffs cite the corollaries to these propositions. These rules of law must be applied to the facts. There is no real problem of law involved in this case, the problem lies in analysis of evidence on a factual basis, bearing in mind that the credibility of witnesses is for the jury, and that questions of negligence and contributory negligence are normally for the jury.

On the question of fire, smoke and fog or steam, the number of witnesses for the defense preponderates over plaintiffs, and there is also the weather data. However, it may be within the juror's observation and experience that, in the vicinity of buildings in which furnaces are operating, there could be momentary down drafts and eddies contrary to the prevailing wind. The evidence on this subject preponderates in favor of the defense but not conclusively so.

On visibility and audibility: The three trainmen contradict the plaintiff driver except as to his stopping at the first track. Of the three disinterested eyewitnesses, the young girl saw the train and gave warning. Whether she heard signals was not brought out. Her father, the driver, stopped after the girl's warning, but stated he did not see the train, and did not recall whether he heard any signals.

The third person in the car testified as to her daughter's warning: "After she called out I was able to see the train. That is the first time I saw the train." As to audibility and visibility she said: "I heard the whistle before the accident took place. I think

several seconds before: It was very close. I recall seeing the headlight; it was faint, but I did see it."

On cross-examination, she said: "Before my daughter called attention to the fact the train was approaching I didn't see the train. If my daughter had not advised me that the train was coming I would not know whether I would have seen the train in time or not."

These witnesses were called for the defense, and it is apparent that some of their testimony is contradictory of the testimony of the train crew.

On due care of the plaintiff driver and his hearing; He stopped at the first track before entering the right of way and looked both ways, he also rolled the window down a couple of inches. He proceeded in low or second gear and stopped again, either too close, or started too soon. There may have been no part of his car over a rail, but the overhang of the train could still strike his car at the apparent point of major impact. Hence, he was too close, but he could be doing what the jury thought was proper in view of the poor visibility of the train, and the lack of adequate signal.

The Berg case cited by the defense supports their contention that negative evidence is of no value as evidence, in a general sense. However, the opinion cites with approval the case of Boston & Main RR., 150 Mass. 386, 23 NE 214, which makes the following qualification:

"It may appear that all the attention of which the witness was capable was concentrated on the effort to ascertain whether the bell was rung, and his failure to hear it could only have been because it made no sound. A witness may be in a conceivable attitude of attention or inattention which will give his evidence value, or leave it with little or no weight."

The plaintiff here stopped twice and opened his window part way, so that, if there had been a bell or whistle he could have heard.

As to the guest, apart from the rule that negligence of the

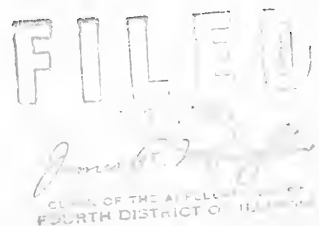
driver, if any, cannot be imputed to the guest, the fact remains that there was no invisible danger known to the guest and not known to the driver. As to visible danger: "Unless the passenger sees an obvious danger which the driver might not see, there would be no duty on the passenger to warn the driver." *Hatcher v. New York Cent. RR Co.*, 17 Ill. 2d 587.

We realize that our statements as to what the plaintiff driver did, are not acceptable to defense counsel, who remain convinced that the driver was a liar, and his testimony is not worthy of belief. This view may well be proper for counsel, but it cannot be the view of this court. The testimony of this witness is not inherently improbable, and it is partly supported by testimony of disinterested witnesses. Without accepting this plaintiff's testimony as entirely accurate, the jury could believe enough of it to present some proof on all essential points. In our opinion, on the whole evidence, there were clearly questions of fact for the jury to resolve. The verdict is not manifestly against the weight of the evidence, therefore, this court should not order a new trial contrary to the ruling of the trial judge. The judgments are affirmed.

JUDGMENTS AFFIRMED.

Culbertson & Hoffman, J.J., concur.

Publish abstract only.



In the Matter of
THE ESTATE OF MARGARET F. BUTLER, Deceased.

DONALD F. BUTLER; GENEVIEVE B. DOMKE; JOHN)	
J. BUTLER by DONALD F. BUTLER, Administrator	)	APPEAL FROM
W.W.A. for the Estate of John J. Butler, Deceased;)	
KATHRYN M. BUTLER by DONALD F. BUTLER, Conserva-	)	THE PROBATE
tor of the Estate of Kathryn M. Butler a/k/a)	
Katherine Butler, Incompetent,	)	COURT OF
)	
Appellants,	)	COOK
)	
vs.	)	COUNTY.
)	
SISTER CATHERINE ALOYSE; MISS KATHRYN)	
MAGEE, individually and as Executor of the Estate)	
of Margaret F. Butler, Deceased; MRS. ANNABELLE)	
O'TOOLE; MRS. KATHERINE BUTLER by DONALD)	
F. BUTLER, Conservator for the Estate of)	
Katherine Butler, Incompetent; MRS. MARIE)	
DU MAIS; MRS. FLORENCE McGOVERN; ST. MARY'S)	
OF THE LAKE CHURCH; POOR CLARE SISTERS OF)	
CHICAGO; CATHOLIC YOUTH ORGANIZATION OF)	
CHICAGO; ST. VINCENT ORPHANAGE; PROPAGATION)	
OF THE FAITH; HELPERS OF HOLY SOULS, INC.;)	
JESUIT MISSIONS, CHICAGO PROVIDENCE;)	
FRANCISCAN FATHERS OF CHICAGO,)	
)	
Appellees.)	

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from the admission of a will to probate. Involved is the estate of Margaret F. Butler who died a spinster October 18, 1960, leaving as her only heirs at law, the contestants in this action and Sister Catherine Aloyse, one of the named proponents. The day after decedent died, the instrument alleged to be her will was found in her home. After the document had been admitted to probate, a petition to vacate order was filed on behalf of an incompetent legatee alleging her name had been omitted from the

Petition for Admission of Will to Probate. An amended petition for admission was filed and a hearing de novo held. The alleged will was again admitted to probate on June 1, 1961, and this appeal followed.

The instrument in question is a legal form printed by George E. Cole & Company denominated a "SHORT WILL." The blanks are filled in the handwriting of decedent and the document was witnessed by two persons, both of whom testified at the hearing below. This controversy surrounds the second, or granting, clause. After the printed words, "SECOND--I give, devise, and bequeath...", decedent made the following initial bequests:

John Butler, Brother-----	\$2,000.00	Two Thousand Dollars	
Miss Kathryn Butler, Niece-----	5,000.00	Five	" "
Mrs. Genevieve Domke, Niece-----	2,000.00	Two	" "
Sister Catherine Aloyse, Niece-----	500.00	Five Hundred Dollars	
Donald F. Butler, Nephew-----	2,000.00	Two Thousand Dollars	
Miss Kathryn Magee, Friend	300.00	Three Hundred Dollars	
Mrs. Annabelle O'Toole, Friend	200.00	Two	" "
Mrs. Kathryn Butler, Sister-in-law	1,000.00	One Thousand Dollars	
Mrs. Marie Du Mais, Cousin	300.00	Three Hundred Dollars	
Mrs. Florence McGovern, Cousin	300.00	"	" "
St. Mary's of the Lake Church (Masses)	200.00	Two	" "
Poor Clare Sisters of Chicago-----	1,500.00	Fifteen Hundred Dollars	
Catholic Youth Organization of Chgo--	1,000.00	One Thousand	"
St. Vincent Orphanage " --	1,000.00	"	" "
Propagation of the Faith-----	500.00	Five Hundred	"
Helpers of Holy Souls, Inc. 30 W. Barry	1,500.00	Fifteen Hundred	"
Jesuit Missions, Chgo Providence	1,500.00	"	" "

Written in the left hand margin opposite this clause were the words, "Remainder of Estate to Franciscan Fathers of Chicago." The instrument dated January 25, 1955, signed by decedent and attested to by witnesses. Subsequently, several alterations were made by decedent in her handwriting. The bequests to Sister Catherine Aloyse and the

Propagation of the Faith were increased to \$1,500.00. The bequest to St. Mary's of the Lake was increased to \$260.00. The name Mrs. Katherine Butler, sister-in-law and the bequest, \$1,000.00 were deleted and in the space between the name and bequest was written the word "Elgin." A paper attached to the will bears the notation, "Memo - I have taken off Katherine Butler (Mother) Sister-in-law because she is now in Elgin." The memo was signed by decedent and dated November 30, 1959.

On the bottom of the page, touching no other words, in the handwriting of decedent, appear the words, "5/12/60 See New Will." Although a diligent search was made through all of decedent's effects, no other will was found.

It is contestants' contention that although this instrument was once the will of decedent, it had been revoked prior to her death. Contestants rely, as they must, on section 46 of the Probate Act (Ill. Rev. Stat., ch. 3, sec. 46). Principal reliance is place on clause (a) of section 46 which provides that a will may be revoked "by burning, cancelling, tearing, or obliterating it by testator himself or by some person in his presence and by his direction and consent."

Contestants assert that the notation on the bottom of the instrument, coupled with the delineations noted previously, satisfy the requirements of clause (a) and constitute a revocation. Contestants have cited Burton v. Wylde, 261 Ill. 397 and Fleming v. Fleming, 367 Ill. 97, but as these cases involved torn wills we do not think they are applicable here since the instrument in question

was not torn or cut in any way.

We believe contestants' argument has been considered and rejected by the Supreme Court in Board of Missions v. Sherry, 372 Ill. 272. There, testatrix had made several alterations to a three page will. The alterations, more numerous than in the instant case, included reduction in legacies and deletion or changing of legatees. The will was kept in an envelope and across the front of the envelope, in testatrix' handwriting, were the words, "August 1st 1938 The enclosed will not to be executed Kate Bennett." The Supreme Court held that the will was not revoked, either by obliteration or by cancellations, stating:

Since every word of the will as originally executed is legible it is manifest that there was no revocation by 'obliterating.' *** In order to constitute the revocation of a will by cancelling there must be a blotting or striking out, or writing over the will or an essential portion thereof, and the cancellation must be made with intent to revoke the will. 372 Ill. at 276.

The court then considered the language on the envelope and held it inoperative to effect a revocation since it was not executed conformably to section 17 of the Probate Act. The words contestants rely on, "5/17/60 See New Will," are found on the bottom margin of the will. They neither delete nor even touch any other writing of the instrument. In Dowling v. Gilliland, 286 Ill. 530, the following language, in testator's handwriting, appeared on the back of the will: "All I have I want to go to my sister, Miss Ella Willden; This is no good; will try to make another.--December 10, 1906." Other words to the same effect appeared on blank spots on the front of the will. The will was held not to be revoked.

Contestants attempt to distinguish the above cases by asserting that the requirement of a blotting or striking out is met so that the intent of the language, "See New Will" should be given effect. Even if the delineations relied upon met the requirement that there be a blotting or striking out, there is no evidence linking the delineations to the language on the bottom of the page. In fact, the only evidence presented, a memo dated November 30, 1959, and written in testatrix' handwriting, indicates that the delineation of Mrs. Butler's name occurred at a time other than when the notation on the bottom was written. Further, this delineation was made because Mrs. Butler had been committed to Elgin State Hospital.

The alterations made include but one deletion of a bequest and increases in several others. There has been no mutilation as in the cases relied upon. We can only conclude, as did the trial judge that the testator only intended to change some bequests but not to revoke the will.

The final point raised concerns cashier's checks purchased by decedent shortly before her death. The checks were made out to three of the legatees, two in the amount of the legacy, one for a smaller amount. This purchase does not, in our opinion, indicate an intent to revoke the entire will but only concerns a possible satisfaction of legacies, a question not involved in this appeal and upon which we express no opinion.

The order admitting the will to probate was correct and that order is affirmed.

AFFIRMED.

MURPHY, J., and ENGLISH, J., concur.
Abstract only.

APPEAL FROM THE
SUPERIOR COURT OF
COOK COUNTY.

Plaintiff answered denying the allegations of the petition recited above, except as to the amounts of the bills, and asked the court to deny modification of the decree.

All parties appeared before the court on February 14, 1962 for the hearing on the petition, and the court, after "having heard arguments of counsel and being advised in the premises," ordered that the decree of divorce be modified to provide that medical services and drugs be obtained from the persons named in defendant's petition; that bills be presented to defendant for payment monthly instead of annually; and that defendant have the right of visitation every Sunday from 1 P.M. to 5 P.M.

Plaintiff filed a verified petition to vacate the order of February 14, 1962, in which petition plaintiff reviewed the proceedings to date and alleged that the result ordered by the court would not be in the child's best interest; that the decree should not have been modified without the taking of testimony showing a change of circumstances, as it had the effect of interfering with plaintiff's custody of the child.* On March 7, 1962, after argument of counsel, the court denied plaintiff's petition, and plaintiff has taken this appeal from the orders of February 14, 1962 and March 7, 1962.

Section 18 of the Divorce Act (Ill. Rev. Stat., Ch. 40, § 19) provides that "the court may, on application, from time to time, make such alterations in * * * the care, custody and support of the children, as shall appear reasonable and proper." The sole contention advanced by plaintiff is that it was unreasonable for the court to make the modification it did without a showing (by evidence) that the attendant circumstances had changed since the entry of the decree. Reliance is made almost exclusively on

* This petition also requested the issuance of a rule on defendant to show cause why he should not be held in contempt for failure to pay the outstanding medical bills in full, and sought payment of plaintiff's attorney's fee required to enforce this payment under a provision of the original decree. On oral argument in this court plaintiff's attorney stated that the medical bills had been paid. The matter of the attorney's fee is not before this court as it was never ruled on by the trial court.

this court's decision in Gottlieb v. Gottlieb, 31 Ill. App. 2d 120.

That case involved a decree which granted custody of minor children to their mother and specifically required that she raise them in the Jewish faith, pursuant to agreement of the parties. The mother refused to abide by this part of the decree and enrolled the children in Catholic schools. At her request, then, the chancellor modified the decree to permit the children's attendance at a school of the mother's choosing. This order was reversed and remanded for further proceedings because the chancellor, without taking any evidence, had acted "in the absence of clearly established circumstances indicating that the best interests of the child would be served by modification." (Page 137.)

In our opinion the decision in the Gottlieb case is distinguishable and is not controlling here. Neither the decree in the instant case, nor the agreement of the parties embodied therein, directed that the services of any particular doctors, dentists or druggists be employed. By its subsequent order the court could, therefore, be said to have merely particularized the decree rather than to have modified it.

We believe that the order of the chancellor on defendant's petition was not an abuse of his statutory discretion, and that the petition itself, under all the circumstances, furnished sufficient basis for his order. We cannot agree with plaintiff's contention that this type of order interferes with any substantial element of custody which had previously been awarded to, and still remains in, her.

AFFIRMED.

BURMAN, P.J., and MURPHY, J., concur.

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Agenda 2

^Alice Jones suffered a stroke in June of 1951, and the

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defendant, Charles A. Spangler, served as conservator of her person and her estate thereafter, until December of 1956. The plaintiff, First Galesburg National Bank & Trust Company, was appointed successor conservator of the estate of the incompetent on December 17, 1956. Thereafter, plaintiff hired the defendant to give care to the incompetent and a court order was entered fixing compensation for care at \$100.00 a month, allowing up to \$50.00 a month for groceries, providing housing and authorizing expenses for clothing, medical and other necessities for the incompetent. In January, 1957, defendant secured a teaching position in another town and he took the incompetent with him and continued to keep her with him and care for her until she was returned by plaintiff to Galesburg on July 29, 1961. In September and October of 1961, real estate of the incompetent was sold to pay debts and provide funds for her care.

The order of the trial court entered on February 20, 1962, allowed an attorney fee to the Law Firm of O'Brien and O'Brien in the sum of \$810.00 for the sale of the real estate of the incompetent and an attorney fee of \$420.00 for services performed for the conservator from May 11, 1961, through January 20, 1962. This order further allowed the sum of \$250.00 for the conservator's fee in the sale of the real estate, a guardian ad litem fee to Robert N. Egan in

the sum of \$35.00 and allowed reimbursement of Sheriff's costs advanced and Revenue Stamps purchased in the total sum of \$36.00.

The services performed by the conservator and its attorney were testified to, respectively, by John Hattery, Assistant Trust Officer for the plaintiff, and by Leo F. O'Brien of the Law Firm of O'Brien and O'Brien, attorneys for the conservator. There was also testimony of an independent attorney, a member of the Knox County, Illinois Bar as to the reasonableness of the attorney fees. The court heard evidence and approved the conservator fees, attorney fees and costs advanced and we cannot say that the order of February 20, 1962, is against the manifest weight of the evidence or that there was any abuse of judicial discretion in allowing the fees.

An order was entered by the court on March 5, 1962, ordering the conservator to pay the claim of Dr. Bronney in the sum of \$291.00 and the claim of St. Mary's Hospital in the sum of \$1,005.20. These claims were for medical services and hospital care rendered the incompetent and were allowed by the conservator, and we believe the court properly ordered them paid.

When the second parcel of real estate of the incompetent was sold to pay debts, the petition to sell real estate named

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the defendant as a party and alleged that he owned some chattel property located on the real estate and was a tenant at will. The defendant, in an answer he filed to the petition, alleged the following:

"7. He admits that said incompetent is the owner in fee simple of Lots 1, 2 and 3 in Block 12 in the Village of Williamsfield, Knox County, Illinois, and that said premises are improved with a frame house; he alleges that said premises are also improved with a two-story cement block building tiled and served by water and electricity, constructed and improved by and at the sole expense of this defendant, and that this defendant, at his sole expense, installed the heating plant in the house on said premises; and he alleges that said premises are subject to an equitable lien in this defendant's favor in the amount of \$5225.00, representing the cost of the aforementioned improvements made by this defendant."

The plaintiff filed a reply to Paragraph 7 denying that the defendant was entitled to an equitable lien and setting forth certain defenses. In the decree of the trial court ordering the sale of real estate on October 17, 1961, the question of an equitable lien was reserved and the real estate ordered sold free and clear of any equitable lien.

On February 27, 1962, the trial court on motion of the plaintiff entered an order finding that Paragraph 7 of defendant's answer to the petition to sell real estate did not state a cause of action for an equitable lien and struck said paragraph.

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Paragraph 7 of defendant's answer fails to allege any relationship between the parties whereby an equitable lien would arise. There is no allegation of any contract between the parties, either written or oral, authorizing defendant to make improvements on the incompetent's property; no allegation as to the dates when the improvements were made, and nothing was alleged to show that the defendant was anything more than a mere volunteer. Merely alleging the furnishing of labor and materials on property without more does not allege facts sufficient to establish an equitable lien. Whenever parties enter into an express executory agreement in writing indicating an intention to make some particular property real or personal or a fund, security for a debt or other obligation, there is created an equitable lien on the property described in such contract, which is enforceable in the hands of the original contractor, and also, his heirs, administrators and executors. An equitable lien is the right to have property subjected in a court of equity to the payment of a claim. *Aldrich v. Ederer Co.*, 302 Ill. 391; *Byron v. Byron*, 391 Ill. 256, 62 N. E. 2d 790. The facts alleged in Paragraph 7 of defendant's answer are insufficient to show that he was entitled to an equitable lien against the property in question, and the paragraph was properly stricken by the trial court.

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Thereafter, at the request of the defendant and by agreement of plaintiff, the answer of the defendant was allowed to stand as a claim against the incompetent's estate for necessities and services alleged to have been rendered the incompetent by defendant and defendant in his answer demanded a trial by jury. The court refused the defendant's request for a jury and a hearing was held on March 23, 1962, before the court on defendant's claim and the court found that the incompetent's estate was indebted to the defendant in the sum of \$1,150.00 and allowed his claim in that amount.

The amount of compensation to be paid a conservator and his attorney for services rendered an estate are matters peculiarly within the province of the court. In re: Kanner's Estate, 2 Ill. App. 2d 530, 119 N. E. 2d 801. The fees to be allowed and paid for such services are to be determined by the court in the exercise of judicial discretion. In re: James' Estate, 10 Ill. App. 2d 232, 134 N. E. 2d 638. However, we are of the opinion that the defendant was entitled to have his claim against the estate of the incompetent heard by a jury. Morton v. Robinson, 256 Ill. 629. The defendant in his answer, which was permitted to stand as a claim against the estate, made demand for jury and we conclude that the trial court erred in refusing this request and hearing the case without a jury.

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For the reasons herein stated, the orders of the Probate Court of Knox County entered on February 20, 1962, February 27, 1962 and March 5, 1962, are affirmed and the order entered on March 23, 1962, allowing the claim of the defendant in the amount of \$1,150.00 is reversed and remanded for a new trial by a jury.

AFFIRMED IN PART AND REVERSED IN PART.

Spencer, J. Concurs.
Crow, J. Concurs.



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